Supreme Court, U.S.
FILED
09-482 JUN 6 - 2009
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No. 09-

IN THE
Supreme Court of the United States

DURAND CLINIC, P.C. and
JASON HOLLADY, M.D.,

Petitioners,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did Sixth Circuit err by not issuing a certification of appealability on the issue of statutory or equitable tolling when petitioner established that defective pleadings were filed in the Michigan trial court before the expiration of the AEDPA one-year limitation while Petitioner was in custody of the state of Michigan?

Did Sixth Circuit err by not issuing a certification of appealability on the issue of statutory or equitable tolling when petitioner established diligence in pursuit of judicial remedies in the face of the extraordinary circumstance of incarceration in a federal prison without access to Michigan habeas law, statute, rules, or procedures?

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to the Petition and was not reported.

The order of the Eastern District Court appears at Appendix C to the Petition and was not reported.

The decision to deny review by the Michigan Supreme Court appears at Appendix E and was not reported.

JURISDICTION

For cases from state courts:

The date on which the highest Michigan court decided my case was November 27, 2007. A copy of that decision appears at Appendix E.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 (d)(1) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

adjudicated on the merits in State court proceedings unless the adjudication of the claim - resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The 14th Amendment to the Constitution of the United States provides in relevant part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE – FIFTH, SIXTH, AND FOURTEENTH AMENDMENT VIOLATIONS IN MICHIGAN ARE ROUTINE

This case presents a pressing issue concerning the administration of criminal justice in Michigan about which the federal and all other state courts are uniquely consistent but Michigan boldly contradicts: Michigan Defendants' Fifth, Sixth, and 14th Amendment rights to due process before deprivation of property or liberty, notice, and jury trial rights are violated in plea based convictions when restitution is awarded for dismissed and uncharged conduct. In these cases, Michigan fails to include all sentence elevating facts in the indictment, fails to notice all sentence elevating facts at plea, fails to receive waiver of jury trial to all sentence elevating facts at plea, and by failing to limit restitution to the facts underlying the conviction, i.e. facts that received a plea, Michigan judges accept an invalid plea and impose an unconstitutional sentence. These procedures violate, inter alia, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Hughey v. U.S.*, 495 U.S. 411 (1990).

The merits of this case have not been reviewed by the Michigan Appeals or Supreme Court. Both Courts denied discretionary review. Merits have not been reviewed by either the Eastern District of Michigan or the Sixth Circuit due to dismissal of habeas as untimely. Eastern District held that habeas was filed after AEDPA one-year limitation expired and after

petitioner was no longer in state custody and then denied the opportunity to reply to the dismissal violating *Day v. McDonough*, 547 U.S. 198 (2006).

Question in front of this Court is whether Eastern District should have applied statutory or equitable tolling and reviewed the merits of this case when petitioner clearly established, inter alia, defective pleadings were timely filed in the trial court during the one-year AEDPA limitation. "Motion to Remit Restitution" was timely filed in the Michigan trial court during the AEDPA one-year limitation. Equitable tolling should apply because this petitioner demonstrated diligence in pursuit of judicial remedies in the face of an extraordinary circumstance - incarceration in a federal prison without access to Michigan habeas law, statute, rules, or procedures is such a circumstance.

PROCEDURAL HISTORY

Petitioner was charged by the State of Michigan with 32 counts of health care fraud consisting of 32 separate medical claims. In October 2000, petitioner pled guilty to two counts. Total monetary value of the 32 counts was less than $1500; the two counts that were the subject of the plea comprised medical claims totaling $75 in value. At sentencing in January 2001, the prosecution requested from the trial court an order of restitution for $604,000 without specific factual allegations ["course of conduct"].

After a hearing, trial court awarded $317,461 in restitution that included an award for dismissed and uncharged conduct. Any amount over $75 violated both Hughey and Apprendi. Petitioner's attorney filed an appeal with the Michigan Court of Appeals but failed to assert any constitutional argument. Michigan Court of Appeals denied the appeal on October 15, 2004. No further appeal was sought until "Motion to Remit Restitution" was filed during one-year AEDPA limitation when petitioner did not have access to Michigan habeas statute.

After release from federal custody, petitioner identified MCR 6.500 as Michigan's habeas statute and filed briefs supplemental to the "Motion to Remit" in the trial court asserting constitutional violations in conviction and sentence. Constitutional assertions were denied.

Trial court stated *Hughey* "applies only to the federal courts." Plea is valid because "this court gave explicit prior notice of the possibility of restitution;" [but not maximum restitution exposure or notice of and waiver to jury trial rights to all sentence elevating facts]. Trial court also stated restitution was proper because "Defendant was afforded a restitution hearing wherein he was properly ordered to pay restitution in accordance with the applicable state statutes and case law;" Sixth Amendment allows judicial factfinding for imposing restitution [true, but

only after plea or jury trial sets outer limits of restitution exposure].

Neither Eastern District nor Sixth Circuit explain why the timely filed "Motion to Remit" does not qualify as "defective pleadings" allowing for equitable tolling; *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990); or why defective pleadings timely filed in the trial court were not identified as habeas when *pro se* petition assertions are required to be "liberally construed" under *Haines v. Kerner*, 404 U.S. 519 (1972); *pro se* filings are entitled to receive opportunity to prove factual allegations by supplementary filings; *Haines*. Neither Court explained why lack of access to the Michigan habeas law during the AEDPA one-year limitation does not qualify for equitable tolling due to diligent petitioner in extraordinary circumstance; *Solomon v. U.S.*, 467 F.3d 928 C.A.6 (Ohio), 2006; *Irwin*, at 96.

CERTIFICATE OF APPEALABILITY REQUIRES TWO PRONG TEST – CONSTITUTIONAL VIOLATION AND DEBATABLE DECISION BY EASTERN DISTRICT

Eastern District Court dismissed this habeas corpus petition and denied certificate of appealability without reaching the merits of constitutional claims. Court ruled *sua sponte* that the petition was barred by AEDPA's one-year statute of limitations and that

Petitioner was not in state custody at the time of filing. Petitioner appealed habeas dismissal and requested certificate of appealability pursuant to Fed. R. App. P. 22(b). A certificate of appealability may issue only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a claim has been denied on procedural grounds:

> "a COA should issue when the prisoner shows . . . that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The bar for a certificate of appealability is not supposed to be so very high. See *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003):

> "our opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that

matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.' Citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that the will not prevail." *Id.*

FIFTH, SIXTH, AND FOURTEENTH AMENDMENT VIOLATIONS IN MICHIGAN PROCEDURAL RULES REQUIRE FEDERAL JUDICIAL ACTION

When a Michigan judge imposes restitution for dismissed and uncharged conduct, indictment has not included all sentence elevating facts; plea hearing does not include notice of all sentence elevating facts; Michigan judge fails to receive waiver of jury trial right to all sentence elevating facts; at sentencing, under Michigan law, the judge is forced to consider and decide upon newly alleged facts at sentencing using a preponderance standard to impose restitution for dismissed and uncharged conduct.

This Court has corrected other Michigan procedural errors that rise to the level of constitutional

violations; see *Halbert v. Michigan*, 545 U.S. 605 (2005). Petitioner is one of hundreds or thousands of Michigan Defendants who have had their Fifth, Sixth, and 14th Amendment rights violated in substantive ways. It continues to happen every day.

MICHIGAN PROCEDURES VIOLATE SIXTH AMENDMENT

Allegations of misconduct in the form of a pattern of behavior were made at sentencing. This elevated the potential restitution sentence from the $75 supported by the facts underlying the plea exposing Defendant to $604,000 in restitution and ballooned the award to $317,461 after a hearing. These alleged facts were not listed in the charging document and did not receive a guilty plea. Facts alleged at sentencing raising sentence exposure are elements of a crime requiring constitutional protections. Trial Court assertion that Sixth Amendment allows for judicial factfinding ignores that the maximum restitution exposure is set by facts admitted at plea, not by a judge ruling at preponderance level on facts newly alleged at sentencing.

In *Apprendi v. New Jersey*, this court identified what facts are elements of the crime: "Our decision in Apprendi clarified what constitutes an 'element' of an offense for purposes of the Sixth Amendment's jury-trial guarantee. Put simply, if the existence of any fact ... increases the maximum punishment that may

be imposed on a defendant, that fact--no matter how the State labels it--constitutes an element, and must be found by a jury beyond a reasonable doubt. *Id.* , at 482-484, 490. *Sattazahn v. Pennsylvania* , 537 U.S. 101, 110 (2003). [Italics mine].

"Our decision in Apprendi makes clear that '[a]ny possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding.' 530 U. S. at 478. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Id.* , at 483–484."

Restitution is criminal punishment; *Pasquantino v. United States,* 544 U.S. 349, ----; 125 S.Ct. 1766 (2005); facts that a judge relies upon to impose an award of restitution are elements of a crime requiring constitutional protections. In Michigan, those facts that a prosecutor withholds until sentencing that increase restitution exposure, are not noticed in the indictment or at plea, and are decided upon by a judge at preponderance level result in Sixth and 14th Amendment jury trial violations. All sentence elevating facts must receive constitutional protections or resulting plea and sentence are invalid.

PROCEDURES VIOLATE FIFTH AMENDMENT

In *Hughey v. U.S.*, 495 U.S. 411 [1990], this court clarified that all facts that are the basis of a restitution award must have been noticed in an indictment, proven beyond a reasonable doubt at trial, or receive a plea.

See *Hughey* at 411-422: "a restitution award is authorized only for the loss caused by the specific conduct that is the basis of the offense of conviction." "[T]he loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order." "To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law." *Hughey*, at 420-421 n.5. [Emphasis added].

Michigan does not comply with *Hughey* or *Apprendi* and fails to limit restitution awards to the facts underlying the conviction due to a Michigan Supreme Court decision. Michigan's Crime Victim's Rights Act [CVRA] was interpreted in *People v. Gahan*, 456 Mich. 264 (1997). The question in front of the court was whether restitution could be awarded for the "course of conduct" that led to the conviction. Decided after *Hughey* (1990) but before *Apprendi*, *Gahan* court answered in the affirmative without mentioning *Hughey* and without considering Sixth

Amendment implications. *Gahan* decision authorizes awards of restitution for dismissed and uncharged conduct; in Michigan, the judge uses the preponderance standard to decide on those additional facts presented at sentencing.

IN PLEA BASED CONVICTION, MICHIGAN PROCEDURES VIOLATE MANY US SUPREME COURT DECISIONS

Michigan's constitutional violations are not limited to unconstitutional restitution awards. By failing to identify all elements of the crime in the indictment, that is, by failing to give notice of all sentence elevating facts, Michigan violates *U.S. v. Cotton*, 535 U.S. 625 (2001) which held that a charging document failing to allege all sentence elevating facts is plain error AND requires a jury trial to correct the defect or conviction is invalid. With a plea-based conviction, there is no jury trial to correct the defect. A defendant in Michigan at the indictment and plea phase is not notified of the "true nature" of the charged crime. *Bousley v. U.S.*, 523 U.S. 614 (1998).

Michigan plea procedures are unconstitutional as a result of *Gahan* leading to invalid pleas and unconstitutional sentences. Lacking notice in the indictment, the trial judge is unaware that he has failed to offer a jury trial to all elements. Failure of trial court to offer jury trial rights to all elements; failure to receive waiver of right to submit all

elements to a jury requires reversal; see *Boykin v. Alabama*, 395 U.S. 238 (1969). A trial judge who will later consider dismissed and uncharged conduct to fashion a restitution award has failed to receive a plea to all elements and the plea is invalid; *Henderson v. Morgan*, 426 U.S. 637 (1976); *Bradshaw v. Stumpf*, 545 U.S. ___ (2005). Failure to limit restitution awards to the conduct underlying the conviction violates Fifth and Sixth Amendments; *Hughey*, *supra*; *Apprendi*, *supra*.

DECISION TO DISMISS CASE IS NOT ONLY DEBATABLE – IT IS WRONG DUE TO BOTH EXTRAORDINARY CIRCUMSTANCE, DILIGENT PETITIONER, AND TIMELY FILED PLEADINGS

Court Ignored, Inter Alia, Timely Filed Defective Pleadings

The merits of this case have not been reviewed. *Day* requires that the decision on whether to dismiss habeas depends upon what is best for the administration of justice. This petitioner was not only diligent in pursuing Michigan habeas claim but faced extraordinary circumstance in filing proper Michigan habeas claim.

Petitioner was incarcerated in federal custody during the entire one-year AEDPA limitation in either Duluth Federal Prison Camp [11/18/04 through

11/18/05] or Saginaw, Michigan halfway house [11/18/05 – 12/18/05]. Petitioner was released AFTER expiration of the one-year limitation. Petitioner was in Michigan custody until 1/12/06. Unbeknownst to petitioner, conviction was final 12/15/05.

During incarceration, petitioner was in a federal prison with no access to Michigan law or statutes. Petitioner identified Michigan constitutional violations by reading, *inter alia*, *Hughey*, *Apprendi*, and Sixth Amendment progeny. Identification of constitutional errors alone is insufficient to obtain review of conviction and sentence in Michigan. Filing of Michigan habeas would be necessary but was difficult to impossible without access to habeas statute or knowledge of Michigan postconviction law or procedures. Petitioner diligently attempted to obtain Michigan habeas statute for the purpose of timely filing state habeas claim. Attempts to obtain Michigan habeas law were exhaustive but unsuccessful.

Petitioner had no way to determine what was necessary to properly file Michigan habeas claim; did not know and could not determine when Michigan conviction was final or what the effect of not filing might be; did not know what court had jurisdiction or what court rules must be followed. Despite this overwhelming handicap, *pro se* prison petitioner timely filed defective pleading "Motion to Remit Restitution" in the proper Michigan court during the

AEDPA one-year limitation while Petitioner was in state custody. See Appendix I for document.

Both Eastern District and Sixth Circuit fail to explain why the timely filed "Motion to Remit" does not qualify as "defective pleadings" under Irwin, *supra* allowing for statutory tolling or why lack of access to the Michigan habeas law during the AEDPA one-year limitation does not qualify as an independent reason for equitable tolling. The Supreme Court is very clear:

> "We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period ..." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)."

Petitioner was in Duluth, Minnesota Federal Prison Camp or Saginaw halfway house for the entire one-year AEDPA limitation without access to Michigan law. During incarceration, petitioner worked constantly to identify constitutional violations in this case using only the federal law available in the federal prison library and making persistent and repeated efforts to obtain Michigan habeas statute which were unsuccessful. See *Irwin*, at 96:

> "Generally, a litigant seeking equitable tolling bears the burden of establishing two

> elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."

A federal prisoner incarcerated without access to Michigan habeas statute is in an extraordinary circumstance. Petitioner worked on this case day and night. Diligent attempts to obtain Michigan habeas statute and properly file habeas challenge to conviction and sentence during one-year AEDPA limitation include:

Requested and received transcripts from court and attorney.

Requested and was denied additional case file material by federal prison.

Requested and was denied Michigan habeas statute by federal prison.

Petitioner requested habeas statute from Michigan trial judge by letter.[1]

Petitioner requested habeas statute by phone in September 2005 telephone hearing. No information was sent.

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[1] Ability to make and/or keep copies of all documents is limited in prison. Affidavits contain factual assertions supporting record of requests made while in FPC Duluth.

Petitioner requested habeas statute from Michigan trial court clerk Sandy Ostrander in writing. Clerk did not send information.

Requested habeas material from previous attorney. No information was sent.

Requested Susan Williams, Michigan friend, call trial court clerk Ms. Ostrander and specifically request "habeas" materials. She called. Court clerk did not send materials. See Ms. Williams' affidavit in Appendix.

Petitioner wrote Michigan trial court judge multiple letters asking to set judgment aside, for stay of proceedings, to appoint attorney, and of desire to bring motions in front of court challenging conviction and sentence. See Appendix.

Petitioner actively discovered constitutional violations through reading Supreme and Federal court decisions, *inter alia*, *Hughey*, *Apprendi*, and progeny.

Without Michigan law, wrote sample briefs describing the constitutional violations instantly.

Petitioner made copious notes or work product on case. Hundreds of pages were produced [not submitted].

Identified *Bounds v. Smith*, 430 U.S. 817 (1977) which argued against filing in any court unresearched claims because of the risk of summary judgment with prejudice and lack of ability to properly reply to state answer.

Concerned about *Bounds* and possibility of dismissal with prejudice, petitioner filed "Motion to Remit Restitution" in the Michigan trial court during the one-year AEDPA limitation while in Michigan custody. Pleadings were defective only in failing to label document "habeas."

Pleadings filed in the trial court during one-year limitation comply with less stringent standards of *pro se* complainant. Such a complaint is supposed to receive opportunity to prove factual allegations by supplementary filings. *Haines v. Kerner*, 404 U.S. 519 (1972). Supplementary filings were made after release from Saginaw.

In on the record telephone hearing [on very bad phone line] held in September 2005 during one-year AEDPA limitation, petitioner told the judge and Michigan Assistant Attorney General of the lack of state of Michigan habeas information in the federal prison library; asserted *Bounds* and problems of *pro se* inmate which, *inter alia*, details the risks of filing petitions without proper library research and a *pro se* prisoners' risk of dismissal with prejudice; asked judge to set judgment aside; told judge of desire to

challenge conviction and sentence; asked judge for Michigan habeas materials; asked for stay of all proceedings.

Filed appeal in Michigan Court of Appeals to September 2005 trial judge ruling from telephone hearing with copy sent to trial court – received NO response from Court of Appeals or trial court.

Petitioner was misled or confused when judge stated to petitioner that the time for all appeals was passed.

MAKE NO MISTAKE,
LACK OF ACCESS TO MICHIGAN LAW
IS EXTRAORDINARY CIRCUMSTANCE

In a federal prison facility, petitioner could not determine if there were some reason that Michigan law conflicted so boldly with Federal law in *Hughey* and *Apprendi*. Aware of the AEDPA one-year limitation and prior to its expiration, without knowing what Michigan court had jurisdiction, when conviction was final, or what was required to file a Michigan habeas claim [after judges' comments in telephone hearing, petitioner could not even be sure Michigan had habeas process] defective pleadings were timely filed.

This petitioner actively pursued judicial remedies, did not sleep on his claims, timely filed pleadings in the trial court. Neither the Eastern District nor the Sixth

Circuit has explained why these pleadings do not qualify for statutory or equitable tolling. Neither court followed the Sixth Circuits' own precedent. See *Solomon v. U.S.*, 467 F3d. 928 (6th Cir. 2006) granting equitable tolling when:

> "defendant was diligent in pursuing his claims, he filed a motion requesting transcripts, and the delay in filing the motion was attributable to lack of access to law library materials while defendant was in prison ..."

Solomon was recently discussed in *Inglesia v. Davis*, Slip Copy, 2009 WL 87574 (6th Cir. 2009):

> "*Solomon v. U.S.*, 467 F3d. 928 (6th Cir. 2006) illustrates the point. In accepting the claimant's equitable-tolling argument, the court noted that the petitioner had made 'request[s] for transcripts' but did not rest its decision on that ground. *Id.*, at 931. The court noted that Solomon had 'worked day and night studying and preparing his [section] 2255 [petition]' but was prevented from filing on time because of a number of adverse circumstances: Besides lack of access to the trial transcript, he had restricted access to the prison's law library, and he was transferred to another penal institution without his legal materials shortly before the end of the

> limitations period. *Id.* at 933-35. Not only was the petitioner thus making every effort to file on time, but the prison transfer-an external circumstance-also prevented him from filing on time."

This Petitioner requested transcripts from trial court and worked day and night to identify constitutional violations in Michigan procedures, repeatedly attempted to obtain Michigan habeas statute to learn what was needed to file a petition that would not be dismissed with prejudice for some unknown procedural reason; petitioner was prevented from filing habeas due to lack of access to Michigan statute; *Bounds* instructed of the possibility of dismissal with prejudice; unlike Solomon who had restricted access to library containing all necessary law, this Petitioner had access to library with none of the necessary law; like Solomon, Petitioner was transferred to another penal institution without legal materials and into a setting with no library at all shortly before the end of the limitations period preventing filing. "Not only was the petitioner thus making every effort to file on time, but the prison transfer-an external circumstance-also prevented him from filing on time." And despite all of this, and unlike Solomon, this prison *pro se* Petitioner managed to timely file defective pleadings in the correct Michigan trial court during the AEDPA one-year limitation. Petitioner also sent letters to judge

asking to set aside the judgment and for a stay and asked others to try to get the court to send habeas.

Other Circuits have found equitable tolling applies when a Petitioner does not have access to adequate library:

> "[D]eficient prison library resources may be grounds for equitable tolling; the inquiry is highly fact-dependent." *Whalem/Hunt v. Early,* 233 F.3d 1146, 1148 (9th Cir.2000) (en banc) (per curiam).

EASTERN DISTRICT HABEAS PROCEDURAL SNAFU WAS IMPROPER

Eastern District Denied Opportunity to Reply to *Sua Sponte* Dismissal of Habeas Violating Due Process

Petitioner petitioned for habeas corpus in the Eastern District Court. Court dismissed the petition and denied a certificate of appealability without reaching the merits of constitutional claims. Court ruled *sua sponte* that the petition was barred by AEDPA's one-year statute of limitations and that Petitioner was not in state custody at the time of filing. Court improperly used February 2006 as date of filing instead of using July 2005 Motion to Remit.

Petitioner requested opportunity to reply before dismissal of habeas. Eastern District denied

opportunity to reply. In *Day v. McDonough*, 547 U.S. ___ (2005), this Court held:

> "Before acting sua sponte, a court must accord the parties fair notice and an opportunity to present their positions." Eastern District denied this opportunity.

Eastern District denied the opportunity to file a reply. Eastern District then denied a request to reconsider denial of Petitioners request to file a reply. Judge stated he could not see circumstances that would satisfy BOTH of his objections.

Petitioner then filed facts stated herein. Timely filed pleadings during AEDPA one-year limitation while Petitioner was in state custody were asserted. Judge stated that Petitioner "could not rely" on those pleadings but did not say why. How does a timely filed pleading in the proper court fail to qualify as "defective" pleadings under *Irwin*? *Haines*? *Solomon*?

This is why Day insists that a Court entertain a reply before the dismissal. By the time Eastern District reviewed the reasons that this habeas should receive a review on the merits, Judge had already dismissed habeas twice. Certainly this suggests the possibility that the case was pre-judged and may explain why the Court ignored the significance of timely filed defective pleadings. We do not know as Judge Borman did not tell us why either those pleadings and/or the deficient

library did not qualify this Petitioner for statutory or equitable tolling; *Irwin*, *supra*; *Haines*; *supra*; *Solomon*, *supra*.

In the first denial, Judge Borman specifically denied equitable and statutory tolling without requesting a reply stating he saw no reason to apply tolling. Of course, a judge may raise timeliness as a objection *sua sponte* but a court is not required to do so. Petitioner could not know if the Court would dismiss on timeliness when Michigan did not and could not raise that issue as they have no time limit on habeas. It was perfectly appropriate to file initial habeas petition without arguing timeliness issue especially when petitioner knew that timely filed pleadings were made. Judge Borman erred to dismiss *sua sponte* without opportunity to reply. His view of the timely filed Motion to Remit pleadings may or may not have been prejudged as a result. But there is also no explanation for why *Irwin*, *Haines*, *Bounds*, or *Solomon* do not apply.

A United States Sixth Circuit Magistrate Judge denied the appeal of the habeas in January 2009 without comment on the specifics of the case. A motion for rehearing en banc was denied on March 12, 2009. It is from this order that Petitioner appeals.

MICHIGAN DEFENDANTS FACE SYSTEMATIC CONSTITUTIONAL VIOLATIONS IN MICHIGAN PROCEDURES

While incarcerated in federal prison reading U.S Supreme Court and Appeals court law, prisoner identified violation of, *inter alia*, *Hughey* and *Apprendi*. Facts that should have been identified as elements of a crime were not alleged in the indictment or at plea but were used at sentencing to impose restitution. Petitioner would NEVER have pled guilty if he had known the constitutional limitation on restitution would be ignored.

Michigan requires a judge to use facts that are not alleged until sentencing to award restitution. Sentence then includes use of facts that were never charged in an indictment, never received a jury trial beyond a reasonable doubt, never received a plea, were not disclosed in the original charging document, and were not disclosed by the judge at plea and were decided upon by a judge, rather than jury, at a preponderance level, not beyond a reasonable doubt.

Judge fails to disclose all sentence elevating facts at plea because the judge does not know of the existence of these elements at plea because they are not raised until sentencing. As a result, a Michigan judge does not receive waiver of jury trial to these additional facts; judge improperly accepts a plea to only one or more of the identified elements of the crime but not

to all elements; a Defendant is not noticed until sentencing of all the facts that will be used to increase the sentence making the plea constitutionally invalid.

At sentencing, the prosecutor alleges additional facts; judge makes findings on those new facts using the preponderance standard in imposing restitution. New allegations might not be specific facts or charges to be proven or disproven; prosecutor may request a dollar amount based on a pattern of behavior ["course of conduct"] rather than specific factual events. This makes a defense to these assertions almost impossible. No other state uses these procedures. Michigan cannot be allowed to continue using these procedures and violate many U.S. Supreme Court decisions and the U.S. Constitution.

GRANTING EQUITABLE OR STATUTORY TOLLING CORRECTS THESE CONSTITUTIONAL VIOLATIONS

Under *Irwin*, timely filed defective pleadings allow equitable tolling. This holding is consistent with *Haines v. Kerner*, 404 U.S. 519 (1972). Under *Haines*, a court is required to "liberally construe" *pro se* pleadings and determine the substance of motions. A court has an obligation to determine the substance of the filings; Eastern District Court and Sixth Circuit failed to "liberally construe" the timely filed Motion to Remit in the Michigan trial court as habeas for

purposes of instant §2254. Courts failed to determine substance of the timely filed motion. A Michigan judge has no need to identify a particular pleading is "habeas" as there are no time limits on filing habeas in Michigan.

FEDERAL *PRO SE* PRISONER PETITIONER CONCERN: DISMISSAL WITH PREJUDICE

The only defect in timely filed Motion to Remit is Petitioner failed to label the documents "habeas." The reason for this is based in U.S. Supreme Court law. Petitioner diligently identified the described constitutional violations and timely filed defective pleadings in the proper court but, *inter alia*, identified, became concerned with, and told the Michigan judge of holdings of *Bounds v. Smith*, 430 U.S. 817 [1977]. Petitioners cited in letters to and in on the record hearing with trial court judge the desire to bring constitutional objections against the Michigan proceedings that resulted in an invalid plea and restitution award. Petitioner then timely filed Motion to Remit.

However, because *Bounds*, which notes the limitations of the *pro se* prisoner and holds that prisoners have constitutional right of access to the courts, *Bounds* cautions against filing any pleading without adequate research. Due to the lack of lack of access to Michigan habeas statute the prisoner lacked critically important information needed to file habeas

in Michigan. *Pro se* prisoner needs to know, *inter alia*, which Michigan court had jurisdiction, what rules must be followed, what format required, what documents were needed to file habeas. Look at the U.S. Supreme Court rules for filing – pages upon pages of rules that must be followed to properly file [deadline? typeset? borders? format?].

In letters and on the record in 9/8/05 telephone hearing, prisoner asked judge for stay, asked for attorney, asked judge to set judgment aside, challenged conviction and sentence by notifying judge of the constitutional violations. *Bounds* is clear: dismissal with prejudice could occur with improper filing:

> "It is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss the case if it is deemed frivolous. Moreover, if the State files a response to a *pro se* pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument. *Id.*, at 826; [citations omitted] [italics mine].

Bounds means that this incarcerated petitioner was between a rock and hard place without the Michigan

habeas statute. The choice presented was to risk filing improperly [file where? File what?] and possibly have case dismissed with prejudice or fail to file timely and possibly lose federal habeas rights.

"It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action. If a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner. *Bounds*, at 825-826.

Petitioner could not research any of those things demanded by *Bounds*. Despite handicap of not having the Michigan statute thus having no idea what the requirements for filing were or which court had jurisdiction, petitioner timely filed Motion to Remit pleadings in the correct court, asked for a stay, asked for attorney to be appointed, asked for opportunity to bring motions in front of the judge upon release from federal custody, and asked judge by letter and orally to set judgment aside. Petitioner was transferred 11/18/05 to Saginaw penal facility with no library at all.

TELEPHONE HEARING MISLED *PRO SE* PRISONER

As noted above, during the telephone hearing, the judge stated that it was past time for any appeal process. He said that time for all appeals was over.

Quoting from September 2005 transcript, p.22-23:

> 22-23 Judge: "to my knowledge, there has been no appeal in relation to that, and we would be beyond the appeal of right and, for that matter, beyond the time for any appeal by leave to have been filed."

Prisoner was totally confused by this statement [and on bad phone line]. Did Michigan have habeas? What did he say? There was no response to letters from FPC Duluth to both the judge and the Michigan trial court clerk to send habeas. There was no response from Susan's calls to Sandy Ostrander, Michigan trial court clerk to send habeas. Court, intentionally or not, misled the Petitioner into thinking that there was no habeas process in Michigan or that the time had run out.

"We have allowed equitable tolling in situations where ... the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, at 96.

ADMINSTRATION OF JUSTICE REQUIRES REVIEW OF CASE ON ITS MERITS

This is not a case where this Court should allow a dismissal of the claim without review on the merits. AEDPA one-year limitation is not a jurisdictional bar and the administration of justice demands review of the merits of this petition. See *Day v. McDonough*, 547 U.S. 198 (2006) this Court held:

> "[a] statute of limitations defense [ ] is not jurisdictional ..." Courts are permitted the "exercise [of] discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition."

Defective pleadings were timely filed in the proper court and according to *Irwin* and *Haines* which should be enough to qualify for review of this case on its merits. Incarcerated *pro se* petitioner did his very best to satisfy the AEDPA without compromising chances of a fair hearing when the U.S. Supreme Court in *Bounds* warns that improper filing could cause dismissal with prejudice. AEDPA was never intended to prevent access to the courts; this line of thinking resulted in Courts' holding the AEDPA one-year limitation is not jurisdictional. Petitioner faced extraordinary circumstances and showed diligence

and determination in the desire to access the courts for post conviction review.

REASONS FOR GRANTING THE WRIT

1) ELIMINATE SYSTEMATIC DENIAL OF MICHIGAN DEFENDANTS' RIGHTS

Michigan Defendants are routinely denied Fifth and Sixth Amendment rights in indictment, plea, and restitution process when a Michigan judge accepts a plea then imposes restitution for dismissed and uncharged conduct. Petitioners' case is not an isolated incident. It is standard procedure in Michigan. This is an ideal case to change these unconstitutional Michigan procedures and make sure that the indictment lists all sentence elevating facts; pleas are made to ALL elements; restitution awards are not imposed for dismissed and uncharged conduct decided by a judge using preponderance standard; that Hughey and Apprendi are implemented in Michigan.

How many chances will this Court get to correct these particular serious procedural deficiencies rising to the level of constitutional violations? It appears that no one has brought this to your attention since Michigan interpreted this in *Gahan* in 1997. This Court has corrected Michigan procedural errors rising to the level of constitutional violations before; see *Halbert v. Michigan*, 545 U.S. 605 (2005).

GVR granting equitable or statutory tolling would allow the lower courts to apply Hughey and Apprendi to Michigan procedures and end the systematic denial of constitutional rights to Michigan Defendants without US Supreme Court action and conserve judicial resources. GVR would also assure lower courts comply with all U.S. Supreme Court decisions. Recent article by District Court Judge Adelman suggests that District Courts do not grant habeas enough. Recent California Law Review Article asserts this Court should focus habeas relief on petitioners demonstrating states that systematically deny constitutional rights to Defendants.

2) WHAT HAPPENED HERE IS WRONG AND AEDPA ONE-YEAR LIMITATION IS NOT JURISDICTIONAL – ADMINISTRATION OF JUSTICE IS BETTER SERVED BY REACHING MERITS OF PETITION; MICHIGAN COURTS IMPROPERLY REFUSED OPPORTUNITY TO REVIEW *GAHAN*

In *Day v. McDonough*, 547 U.S. 198 (2006) this court held:

> "[a] statute of limitations defense [] is not jurisdictional ... Courts are permitted the "exercise [of] discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of

limitations grounds or by reaching the merits of the petition."

Allowing a Court to dismiss habeas without review on the merits does not better serve justice when Michigan is violating the constitutional rights of many Defendants, when those constitutional violations are standard operating procedure. Defendants are at a serious disadvantage as a result of these procedures. Michigan Supreme Court failed miserably in *Gahan* to require that Michigan procedures comply with the Fifth and Sixth Amendments. They did not even entertain the constitutional arguments!

Michigan Supreme Court had the opportunity to review *Gahan* and improperly chose to deny discretionary review; Michigan cannot live by their own set of rules forever; all Defendants should be treated equally; this result could not have happened in Wisconsin, Iowa, New York, Arkansas, New Mexico, or any other state.

What happened here is wrong. This Court as the Highest Court has the obligation to end systematic violations of our constitution by the many states. If this were a unique one of a kind case, this Court should not waste its time and petitioner would not have filed in every court over the years. But this case illustrates systematic denial of constitutional rights by Michigan authorities. This is intolerable to our

civilized society. We are a nation of laws. As noted, this Court has corrected Michigan procedural errors rising to level of constitutional violations before; see *Halbert v. Michigan*, 545 U.S. 605 (2005); now it is time to correct another.

Ultimately, this Court must answer this question – under *Day*, how is the administration of justice better served by dismissing this case?

3) THESE PROCEDURES ARE USED EVERY DAY IN MICHIGAN

In May 2009 five physicians were arrested in Michigan on charges of, *inter alia*, health care fraud. The investigation was assisted by Blue Cross Blue Shield of Michigan investigators. In the coming months, these physicians will be pressured to plea to one or two of the charges in exchange for a lesser sentence. Then, at sentencing, other charges or facts will be alleged in an attempt to obtain a much higher restitution award than would be authorized by the plea. Should a plea result, it will be constitutionally invalid once the prosecutor alleges other conduct at sentencing in an attempt to raise the award of restitution.

These Defendants should not have to face unconstitutional procedures that Michigan uses. Blue Cross Blue Shield should not be allowed to obtain restitution awards for dismissed and uncharged

conduct not alleged until sentencing then proven to a judge at preponderance after criminal proceedings where the judge by considering dismissed and uncharged conduct has rendered the plea constitutionally invalid. Blue Cross has other remedies available to them. They have established a pattern and are using this as a revenue generating device.

Michigan had the opportunity to correct their procedures and review *Gahan* by accepting this case and failed to do so. They have an obligation to their citizens to make sure procedures comply with the constitution. Because they failed to do so, it is this courts obligation to correct such blatant systematic constitutional violations. A GVR will result in constitutional compliance for Michigan indictment, plea, and restitution procedures in every plea based conviction.

4) PLEA BASED CONVICTIONS SETTLE MOST CASES

Given the fact that 90% or more of criminal cases are resolved by plea, isn't it time to end the systematic denial of constitutional rights in Michigan?

CONCLUSION

The administration of justice is better served by a review of the merits of this case. Present and future Michigan Defendants depend upon overturning the *Gahan* decision which codified constitutional violations of the 5th, 6th, and 14th Amendments. This Court has the duty and obligation to reverse systematic violations of constitutional rights wherever you may find them. This Court has assured the rights of individuals against the power of the Government for over two hundred years. It is exactly this case that needs to receive GVR to allow the system to correct its mistakes and reverse discriminatory practices against Michigan Defendants.

I declare that all the statements within are true to the best of my information, knowledge, and belief.

Respectfully submitted,

Jason Hollady
Petitioner pro se
213 Mercer Street
Durand, MI 48429
June 5, 2009

APPENDIX

APPENDIX A

DENIAL OF REHEARING BY SIXTH CIRCUIT

No. 08-1159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JASON HOLLADY,

FILED
March 12, 2009
LEONARD GREEN,
Clerk

JASON HOLLADY,

Petitioner-Appellant,

v. ORDER

STATE OF MICHIGAN, DURAND CLINIC, PC,

Respondents-Appellees.

Before: BATCHELDER, ROGERS, and KETHLEDGE, Circuit Judges.

Jason Hollady, a Michigan proceeding pro se, petitions for a rehearing en banc of this court's November 25, 2008, order that denied his motion for certificate of appealability. The petition was initially referred to a panel of three judges on which the original deciding judge does not sit. After review of the petition, this panel advised the Clerk of the Court of its conclusion that the original motion was properly denied. The petition was then circulated to all of the active Judges of the Court.

No Judge having requested a vote, the petition for rehearing has been referred back to this panel for disposition, pursuant to established court procedures. Because the panel has concluded that the original motion was properly denied, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AFFIRMING EASTERN DISTRICT OF MICHIGAN OPINION AND ORDER DISMISSING HABEAS CORPUS PETITION AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

No. 08-1159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 25, 2008
LEONARD GREEN,
Clerk

JASON HOLLADY,

Petitioner-Appellant,

v.

ORDER

STATE OF MICHIGAN, DURAND CLINIC, PC,

Respondents-Appellees.

Jason Hollady, a pro se, moves for a certificate of appealability in this appeal from a district court judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254.

On October 23, 2000, Hollady pleaded guilty in a Michigan court to two counts of health care fraud. The trial court ordered Hollady to pay $347,463 in restitution to Blue Cross/Blue Shield. The court then amended the judgment of sentence to require restitution in the amount of $317,461. Hollady appealed the trial court's decision, but the Michigan Court of Appeals denied leave to appeal on October 15, 2004. Hollady did not appeal that decision to the Michigan Supreme Court, and the deadline for doing so expired on December 10, 2004. See Mich. Ct. R. 7.302(C)(2).

In 2006, Hollady filed four motions for relief from judgment. The trial court ultimately denied all four motions, and the Michigan Court of Appeals denied leave to appeal. The court of appeals stated that Hollady had failed to establish entitlement to relief under Mich. Ct. R. 6.508(D).

Hollady submitted his habeas petition for mailing on December 10, 2007, and the Clerk of Court filed it on December 12, 2007. The petition contains five claims challenging the order of restitution and one claim alleging ineffective assistance of counsel. Noting that the Michigan Department of Corrections discharged Hollady from state custody on January 23, 2006, the district court dismissed the habeas petition for lack of jurisdiction because Hollady could not satisfy the "in custody" requirement necessary for an award of habeas corpus relief. See 28 U.S.C. §§ 2241(c)(3) and 2254 (a); Maleng v. Cook, 490 U.S.,

488 (1989). The court dismissed the habeas petition because the one-year statue of limitations had expired, see 28 U.S.C. § 2244(d)(1), and because nothing contained in the pleadings suggests that the limitations period could be – or should be – tolled, see Dunlap v. United States, 250 F.3d 1001, 1004-05 (6th Cir. 2001). The court also declined to issue Hollady a certificate of appealability. He now asks this court to issue a certificate.

A certificate of appealability is issued "only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by demonstrating that reasonable jurists could debate whether the petition should have been determined in a different manner, Banks v. Dretke, 540 U.S. 668, 705 (2004), or that the issues presented were "adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000). In addition, before a court may issue a certificate of appealability in a case where the habeas petition has been denied on a procedural ground, without reaching the underlying constitutional claims, the court must find that the petitioner has demonstrated that reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right and that reasonable jurists could debate whether the district court was correct in its procedural ruling. *Id.* "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not

conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id.

Reasonable jurists could not debate that Hollady's habeas petition is untimely or that he has not demonstrated that equitable tolling should apply to his petition due to his alleged lace of constructive or actual knowledge of the filing requirements. See Dunlap, 250 F.3d at 1003.

Accordingly, the motion for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Clerk

APPENDIX C

EASTERN DISTRICT OF MICHIGAN OPINION AND ORDER DISMISSING HABEAS CORPUS PETITION AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JASON HOLLADY and DURAND CLINIC, P.C.,

Petitioners,

v.

CASE NO. 07-15300

PAUL D.BORMAN
UNITED STATES
DISTRICT JUDGE

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

_____/

OPINION AND ORDER DISMISSING HABEAS CORPUS PETITION AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

Petitioner Jason Hollady has filed a pro se application for writ of habeas corpus under 28 U.S.C. § 2254. The habeas petition challenges Petitioner's state conviction and sentence for health care fraud. Petitioner is no longer in custody for the conviction under attack, and the one-year statute of limitation has expired. Consequently, the habeas petition must be dismissed.

I. Background

Petitioner alleges that on October 23, 2000, he pleaded guilty to two counts of health care fraud. In return, thirty additional counts of health care fraud were dismissed. As part of the sentence, the trial court ordered the petitioner to pay $347,463 in restitution to Blue Cross/Blue Shield. The trial court later amended the judgment of sentence to require restitution in the amount of $317,461. Petitioner appealed the trial court's decision, but the Michigan Court of Appeals denied leave to appeal on October 15, 2004. See People v. Hollady and Durand Clinic, No. 256165 (Mich. Ct. App. October 15, 2004) (unpublished). Petitioner did not appeal that decision to the Michigan Supreme Court, and the deadline for doing so expired on December 10, 2004. See Mich. Ct. R. 7.302©(2) (stating that an application for leave to appeal in a criminal case must be filed in the Michigan Supreme Court within fifty-six days of the court of appeals decision).

In 2006, Petitioner filed four motions for relief from judgment. The trial court ultimately denied all his motions, and the Michigan Court of Appeals denied leave to appeal the trial court's decisions. The court of appeals stated that Petitioner has failed to establish entitlement to relief under Michigan Court Rule 6.508(D). See People v. Durand Clinic, P.C., Nos. 271104 and 272736 (Mich. Ct. App. May 18, 2007). On November 29, 2007 the Michigan Supreme Court also denied leave to appeal for failure to establish entitlement to relief under Michigan Court Rule 6.508(D). See People v. Durand Clinic, P.C., ___ Mich. ___; 741 N.W.2d. 322 (2007).

Petitioner has submitted his habeas corpus petition for mailing on December 10, 2007 and the Clerk of the Court filed it on December 12, 2007. The petition contains five claims challenging the order for restitution and one claim alleging ineffective assistance of counsel.

II. Discussion

A. The "In Custody" Requirement

A federal district court may entertain an application for the writ of habeas corpus under 28 U.S.C. § 2254 only if the prisoner is "in custody" in violation of federal law. 28 U.S.C. §§ 2241©(3) and 2254(a). The Supreme Court has interpreted this

language to mean that a habeas petitioner must "be 'in custody' under the conviction or sentence under attack at the time his petition is filed." Maleng v. Cook, 490 U.S. 488, 490-91 (1989) (citing Carafas v. LaVallee, 391 U.S. 234, 238 (1968) (emphasis added). The Supreme Court has never held "that a habeas petitioner may be 'in custody' under a conviction when the sentence imposed for that conviction has fully expired at the time the petition is filed." Id. at 491 (emphasis in original). In fact, "once the sentence imposed for a conviction has completely expired, [even] the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack." Id. at 492.

Records maintained by the Michigan Department of Corrections indicate that Petitioner was discharged from state custody on January 23, 2006. He filed his habeas petition on December 12, 2007. By then, he was no longer in custody for the convictions under attack. Even if he is still obligated to make restitution, "courts have generally held that a person sentenced to only a fine or restitution is not 'in custody.'" Fields v. Oklahoma, 243 Fed. Appx. 395, 397 (10th Cir. 2007) (collecting cases) (unpublished decision). Accordingly, the Court lacks jurisdiction to consider the substantive merits of Petitioner's claims.

B. The Statute of Limitations

Petitioner's claims also barred from substantive review by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which established a one-year period of limitations for habeas petitions filed by state prisoners. See 28 U.S.C. § 2254(d). The limitations period runs from the latest of

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered by due diligence.

28 U.S.C. § 2244(d)(1).

Petitioner is not asserting that a state-created impediment prevented him from filing his habeas petition sooner, and the primary court decisions on which he relies (People v. Gahan, 456 Mich. 264 (1997), Hughey v. United States, 495 U.S. 411 (1990), and Apprendi v. New Jersey, 530 U.S. 466 (2000)), were decided before he was sentenced in 2001. Therefore, the factual predicate for his claims could have been discovered earlier, and he is not relying on a new and retroactive constitutional right. Subsection 2244(d)(1)(A) is the only relevant subsection here.

Petitioner's conviction became final under subsection 2244(d)(1)(A) on December 10, 2004, when the deadline for seeking review in the Michigan Supreme Court expired, and his direct appeal came to an end. Erwin v. Elo, 130 F.Supp. 2d 887, 889 (E.D. Mich. 2001) (Tarnow, J.). The statute of limitations began to run the following day, and it expired one year later on December 10, 2005. Petitioner did not file his habeas petition until almost two years later. Although "the one-year limitation period is tolled for the 'time during which a properly filed application for State or other collateral review with respect to the pertinent judgment or claim is pending,'" Ege v. Yukins, 485 F.3d 364, 371-72 (2007) (quoting 28 U.S.C. § 2244(d)(2)), Petitioner did not file his post-conviction motions for relief from judgment until February of 2006. By then, the limitations period had expired. Thus, the motions had no affect on the

limitations period. Hargrove v. Brigano, 300 F3d. 717, 718 n.1 (6th Cir. 2002).

In appropriate circumstances, equitable tolling applies to the one-year limitations period for habeas petition. Dunlap v. United States, 250 F3d. 1001, 1003 (6th Cir. 2001). However, Petitioner has not alleged that he lacked notice or constructive knowledge of the filing requirement, and he has not demonstrated diligence in pursuing his rights. The Court therefore declines to equitably toll the limitations period.

III. Conclusion

Review of Petitioner's claims is barred by Petitioner's failure to comply with the statute of limitations. Furthermore, Petitioner fully served his sentence for the convictions and sentence in dispute before he filed his habeas petition. He has not satisfied the "in custody' requirement of the habeas statute, and the Court has no jurisdiction to consider his claims. Accordingly, IT IS ORDERED that the habeas petition is summarily DISMISSED pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. The Court DECLINES to issue a certificate of appealability because two clear procedural bars exist, and reasonable jurists would not find it debatable whether the habeas petition states a valid claim of the denial of a constitutional right or whether the

Court's procedural rulings are correct. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

s/Paul Borman
PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

Dated: January 7, 2008

CERTIFICATE OF SERVICE

Copies of this Order were served on petitioner and the attorneys of record by electronic means or U.S. Mail on January 7, 2009.

s/Denise Goodine
Case Manager

APPENDIX D

ORDER DENYING PETITIONER'S REQUEST TO FILE A REPLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JASON HOLLADY and
DURAND CLINIC, P.C.,

Petitioners,

v.

CASE NO. 07-15300
PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.
_____/

ORDER DENYING THE PETITIONER'S REQUEST TO FILE A REPLY

On December 12, 2007, petitioner Jason Hollady filed a pro se application for the writ of habeas corpus under 28 U.S.C. § 2254. The habeas

petition challenged Petitioner's state convictions and sentence for health care fraud. On January 7, 2008, the Court summarily dismissed the habeas petition on the grounds that (1) Petitioner was no longer in custody for the conviction under attack and (2) the one-year statute of limitations had expired. Currently pending before the Court is Petitioner's request for opportunity to file a reply to the Court's Opinion and Order dismissing his habeas petition. Petitioner seeks to demonstrate that equitable tolling applies to the one-year limitations period.

Petitioner's request [Doc. 4, Jan.22, 2008] essentially seeks reconsideration of the Opinion and Order dismissing his habeas petition. Under Local Rule 7.1(g)(3)(E.D. Mich. Dec. 1, 2005), a party is entitled to reconsideration only if he can show that the Court and the parties were misled by a palpable defect and that correcting the defect will result in a different disposition of the case.

Even if the Court erred in summarily dismissing Petitioner's case on the basis of the statute of limitations, the fact remains that Petitioner is not in custody for the convictions under attack. Thus, reconsideration of the Court's ruling on the statute-of-limitations issues would not result in a different disposition of the case, and the Petitioner's request is DENIED.

s/Paul Borman
PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

Dated: February 6, 2008

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record by electronic means or U.S. Mail on February 6, 2008.

s/Denise Goodine
Case Manager

APPENDIX E

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL BY MICHIGAN SUPREME COURT

ORDER

Michigan Supreme Court
Lansing, Michigan

November 29, 2007

134308-9

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

SC: 134308-9
COA: 271104, 272736
Shiawassee CC: 00-004893-FH
00-004894-FH

DURAND CLINIC, P.C.,
Defendant,

and

JASON HOLLADY,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the May 18, 2007 orders of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 29, 2007

s/Corbin R. Davis
Clerk

APPENDIX F

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL BY MICHIGAN COURT OF APPEALS

Court of Appeals, State of Michigan

ORDER

People of MI v. Jason L Hollady MD

Richard Allen Griffin
Presiding Judge

Docket No. 256165

William C. Whitbeck

LC No. 00-004893-FH

Peter D. O'Connell
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

s/Richard A. Griffin
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 15 2004
Date

s/Sandra Schulz Mengel
Chief Clerk

APPENDIX G

ORDERS (3) DENYING PETITIONER'S REQUEST FOR STATE HABEAS ACTION ON CONVICTION AND SENTENCE

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF SHIAWASSEE

PEOPLE OF THE
STATE OF MICHIGAN

Plaintiffs, Case No. 00-4893-FH
Case No. 00-4894-FH

v.

Hon. Gerald D. Lostracco

DURAND CLINIC, P.C. and
JASON HOLLADY,

ORDER

Defendants,
_____/

At a session of said Court, held in the Courthouse City of Corunna, Shiawassee County. On the 31st day of May, 2006.

PRESENT:
HONORABLE GERALD D. LOSTRACCO
35th Circuit Judge

This matter is presently before the Court on Defendant's Motion for Relief from Judgment pursuant t MCR 6.501. Following a careful review of the file, Defendant's Motion, hearing transcripts, applicable statutes, and case law; Defendant's Motion is denied.

Defendant claims that the plea colloquy established by the Federal Rules of Criminal Procedure (FRCP) 11, preempts that portion of Michigan Court Rules (MCR) 6.302 that is unconstitutional and which allows a defendant to plead without adequate notice of the amount of restitution he may be ordered to pay. Defendant concedes that in the instant case, the Court complied with the plea colloquy rules of Michigan. Defendant claims that there is a direct conflict between FRCP 11 and MCR 6.302. To support his position, Defendant cites U.S. v. Powell, 354 F3d. 362 (2003).

Upon review, it is noted that the Court in Powell addressed the requirement of the Mandatory Victims Rights Act (MVRA), 18 U.S.C. § 3663A. The Court held that:

[b]ecause pleading guilty to certain crimes will result in an order of mandatory restitution and

because the district court cannot consider the pleading defendant's financial situation and must order payback of the full amount, it is extremely critical that the sentencing judge give as full a disclosure as possible at the time of the plea colloquy regarding the court's authority to order mandatory restitution and the probable quantum thereof. *Id.* at 369-370.

Defendant further cites U.S. v. Glinsey, 209 F3d. 386 (2000). The Court in Glinsey addressed the defendant's claim that he was not notified of the potential to be ordered to pay restitution. However, a defendant was ordered to pay a fine in the amount of $1,000,000. *Id.* The court noted that it:

Reversed the district court because the 'imposition of a restitution order in so large an amount, without explicit prior notice of the possibility of restitution, could scarcely be deemed either harmless or not to affect the defendant's substantial rights. Id. at 395.

Unlike Powell, in the instant case, the crime pleaded to by Defendant does not, by statute, require that the Court impose mandatory restitution. As such the court gave "as full a disclosure as possible at the time of the plea colloquy." Further, as noted in the plea transcript, this court gave "explicit prior notice of the possibility of restitution."

In the present case Defendant was afforded a restitution hearing wherein he was properly ordered to pay restitution in accordance with applicable state statutes and case law.

Further, as the case law cited by Defendant does not support the argument that there is a direct conflict between FRCP 11 and MCR 6.302. Defendant's argument of ineffective assistance of counsel based upon his counsel's lack of objecting under the grounds of preemption is found to be without merit.

IT IS THEREFORE ORDERED that Defendant's Motion for Relief from Judgment pursuant to MCR 6.501 is DENIED.

s/Gerald D. Lostracco
CIRCUIT JUDGE

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF SHIAWASSEE

PEOPLE OF THE
STATE OF MICHIGAN

Plaintiffs, Case No. 00-4893-FH
Case No. 00-4894-FH

v.

Hon. Gerald D. Lostracco

DURAND CLINIC, P.C. and
JASON HOLLADY,

ORDER

Defendants,
_____/

At a session of said Court, held in the Courthouse City of Corunna, Shiawassee County. On the 31st day of May, 2006.

PRESENT:
HONORABLE GERALD D. LOSTRACCO
35th Circuit Judge

This matter is presently before the Court on Defendant's Motion for Relief from Judgment

pursuant to MCR 6.502. Following a careful review of file, hearing transcripts, and Defendant's Motion, applicable statutes, and case law; Defendant's Motion is denied.

Defendant claims that the restitution authorized by the Michigan Victim's Crime Rights Act is preempted by federal law. To support his position, Defendant cites Hughey v. US, 495 US 411 (1990). The Court in Hughey interpreted the Victim and Witness Protection Act (VWPA), 18 USC § 3579(a)(1). A review of Hughey shows that the United States Supreme Court when commenting on the Court's ability to order restitution noted that the VWPA authorizes federal courts to order a defendant to make restitution. Id. at 411.

Applying Hughey, the VWPA applies only to federal courts. As Congress has not acted to address the Court's interpretation of Hughey, it is significant evidence that Congress has not expressed the intent to preempt state law, nor shown the intent to occupy this field exclusively. As Defendant was charged and sentenced under Michigan statutes in this Court, the Michigan Victim's Crime Rights Act is applicable and does not conflict with the VWPA.

In the present case Defendant was afforded a restitution hearing wherein he was properly ordered to pay restitution in accordance with applicable statutes and case law.

Further, Defendant's argument of ineffective assistance of counsel based upon his counsel's lack of objecting for the above stated grounds of preemption is found to be without merit.

IT IS THEREFORE ORDERED that Defendant's Motion for Relief from Judgment pursuant to MCR 6.502 is DENIED.

s/Gerald D. Lostracco
CIRCUIT JUDGE

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF SHIAWASSEE

PEOPLE OF THE
STATE OF MICHIGAN

Plaintiffs,

Case No. 00-4893-FH
Case No. 00-4894-FH

v.

Hon. Gerald D. Lostracco

DURAND CLINIC, P.C. and
JASON HOLLADY,

ORDER

Defendants,

_____/

At a session of said Court, held in the Courthouse City of Corunna, Shiawassee County. On the 31st day of May, 2006.

PRESENT:
HONORABLE GERALD D. LOSTRACCO
35th Circuit Judge

This matter is presently before the Court on Defendant's Motion Vacate [to] Vacate Restitution

pursuant to MCR 6.501. Following careful review of the file, Defendant's Motion, applicable statutes, and case law; Defendant's motion is denied.

Defendant claims that the restitution ordered violates his due process rights as protected by the fifth and sixth amendments, specifically noting that it is inappropriate for a judge to act as factfinder in a restitution hearing. Defendant further claims an incorrect standard of proof was applied at the restitution hearing. To support his position, Defendant cites U.S. v. Booker, 543 US 220 (2005) and Kelly v. Robinson, 479 US 36 (1986).

Upon review, it is noted that the Court in Booker addressed federal sentencing guidelines subject to jury trial requirements. At the sentencing hearing, the Judge in Booker found additional facts by a preponderance of the evidence and enhanced the defendant's sentence. The U.S. Supreme Court held this was a violation of defendant's due process rights because the appropriate fact finder was the jury and not the judge. Defendant further argues that the Court in Kelly purports to hold that restitution is penal in nature rather than compensatory. Defendant argues that as such, restitution is subject to a higher standard of proof. And, applying Booker, the appropriate fact finder for a restitution hearing is a jury.

However, a review of Kelly shows that the U.S. Supreme Court addressed the applicability of Conn. Gen. Stat. §53a-30(a)(4)(1985) to the Federal Bankruptcy Code. In Kelly, the Court interpreted defendant's ability to discharge ordered restitution through bankruptcy proceedings. At no time does the Kelly Court address a restitution hearing procedure.

In the present case Defendant was afforded a restitution hearing wherein he was properly ordered to pay restitution in accordance with applicable state statutes and case law.

Further, Defendant's argument of ineffective assistance of counsel based upon his counsel's lack of objecting for the above stated grounds of preemption is found to be without merit.

IT IS THEREFORE ORDERED that Defendant's Motion for Relief from Judgment pursuant to MCR 6.502 is DENIED.

s/Gerald D. Lostrocco
CIRCUIT JUDGE

APPENDIX H

LETTERS FROM FPC DULUTH TO TRIAL COURT JUDGE ASKING FOR STAY IN ORDER TO BRING "A NUMBER OF LEGAL ISSUES ... TO YOUR ATTENTION" AND TO "SET ASIDE JUDGMENT"

July 1, 2005

Dear Judge Lostrocco,

Blue Cross Blue Shield of Michigan ("BCBSM") has renoticed a hearing that was scheduled in your court on 6.28.05 to be heard now on 8.22.05. I renew my request for a postponement of this hearing until after my release 12.19.05.

In my present location, I have no access to Michigan laws or statutes. That is important since I am filing pro se at this time. I do not have an attorney representing me and choose to have an attorney in this matter. I will not be able to retain counsel until I come home. In fact, due to my financial circumstances, I may ask you to appoint counsel in forma pauperis if I can figure out how to make such a motion.

My probation was extended by your order to 1.12.06 for the specific reason of giving me more time to pay BCBSM. Therefore, I request that all

proceedings be postponed until I can appear at hearings, with counsel, after having read the appropriate rules, laws, and statutes.

Please enter an order allowing this to occur.

Thank you.

Sincerely,

s/Jason Hollady

Jason Hollady

July 25, 2005

I am in receipt of Mr. Walton's letter of July 21st not agreeing to adjourn the hearing for August 22, 2005. I ask that you enter an order to postpone that hearing despite their objection for the following reasons.

As you know, I am not represented by counsel, cannot appear on my own behalf, have no access to Michigan laws or statutes, and will be unavailable to the court until after 12/19/05. Upon my return, there are a number of legal issues I wish to bring to your attention but I cannot at this time.

Please note that the judgment granted by the Court on 5/12/05 falls under the jurisdiction of the Crime Victims Rights Act. Paragraph 12 of that Act allows a defendant to notify you of the need to modify the method of payment which I am doing now. What value is the act if a victim can enforce a judgment during my probation and while the Court retains jurisdiction to modify payment schedules? All I am asking is that the hearing be held when I can appear with counsel. That seems appropriate.

I will direct your attention to Title 28 U.S.C. § 1655 Lien enforcement: absent defendants. Please see the last paragraph which states the following: "Any defendant not so personally notified may, at any time within one year after final judgment, enter his

appearance, and thereupon the court shall (boldface mine) set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just."

The First Circuit in Massachusetts is Equitable Life Assurance v. U.S. 331 F2d. 29 clarified this statute by stating that "This section relating to enforcement of liens where there is an absent defendant, who fails to appear and has not been personally served only by publication, the right to have judgment vacated in one year." 1964 I was not personally served prior to the judgment and do not know if it was published. Therefore, I am notifying the Court that upon my return I will enter an appearance and request that the Court follow this provision and set aside the judgment as provided by law. It seems easier to simply postpone the hearing until a date in early January of 2006 when I will be available to appear, had time to hire and confer with counsel rather than a hasty hearing where the defendant cannot be represented, something the victim seems to prefer. Thank you.

Sincerely,

s/Jason Hollady
Jason Hollady

July 27, 2005

I am in receipt of Mr. Walton's letter of July 21, 2005 stating his client's failure to agree to adjourn the hearing scheduled August 22, 2005 in your Court. I ask that despite their objection you enter an order of postponement until after 12.19.05 for the reasons set forth previously. I am not represented by counsel, cannot hire one at this time, cannot appear on my own behalf, have almost no access to Michigan laws or statutes, and cannot even secure copies of documents to send to the court or Mr. Walton.

I request that a hearing be scheduled after 12.19.05 when I will respond to BCBSM's motion and bring a number of legal issues to the Court's attention. I regret that I am unable to appear on 8.22.05 or hire counsel to do so for me. I do have two points to bring your attention at this time.

I will now direct your attention to Title 28 U.S.C. § 1655 Lien enforcement: absent defendants. Please see the last paragraph which states the following: "Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall (emphasis added) set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just."

In Equitable Life Assurance Society of U.S. v. U.S. 331 F2d. 29, 37-38 (1st Cir. 1964) stated that "This section relating to enforcement of liens where there is an absent defendant, who fails to appear and has not been personally served only by publication, the right to have judgment vacated in one year." I was not personally served prior to the judgment and do not know if it was published. Therefore, I am notifying the Court that upon my return I will enter an appearance and request that the Court follow this provision and set aside the judgment as provided by law. It seems easier to simply postpone the hearing until a date in early January of 2006 when I will be available to appear, had time to hire and confer with counsel rather than a hasty hearing where the defendant cannot be represented, something BCBSM seems to prefer. Thank you.

Sincerely,

s/Jason Hollady
Jason Hollady

APPENDIX I

MOTION FOR CONTINUANCE, MOTION FOR APPOINTMENT OF COUNSEL AND MOTION FOR REMISSION OF RESTITUTION

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF SHIAWASSEE

PEOPLE OF THE STATE OF MICHIGAN, Case No. 00-4893-F

vs. MOTION FOR CONTINUANCE and MOTION FOR APPOINTMENT OF COUNSEL and MOTION FOR REMISSION OF RESTITUTION

DURAND CLINIC, P.C. and
JASON HOLLADY, M.D.,

Defendants.

COMES NOW, Defendant, Jason Hollady, appearing pro se, who respectfully brings his motions before this Honorable Court. ("I," "me," "my," not "Defendant.")

MOTION FOR CONTINUANCE

One of the primary reasons for seeking a continuance is that I am very concerned about absence of counsel in this very important hearing. There are matters which I believe entitle me to be heard and I do not desire to have my rights in these matters compromised because I cannot at present afford counsel. (See my motion for appointment of counsel hereunder.) It is my belief that it is appropriate under Michigan law for the Court to reduce the amount of restitution due both to the "manifest hardship on [me] or [my] family" People v. Music, 408 NW 2d 795, 428 Mich 356, 362), or under "circumstances where [I have] suffered unanticipated reverse affecting [my] financial situation following entry into restitution agreement" ("People v. Grant, 565 NW 2d 389, 455 Mich 221, 222). I contend that both of these factors warrant the Court's revisitation of the order of restitution and I cannot accomplish an effective argument on these grounds without representation. Lastly, for these purposes only, I contend that the People are not in any way damaged by a continuance; however, I may be irreparably damaged if the Court does not grant me the continuance so that I can proceed to seek any rights or allowances to which I may be entitled under law and/or or the discretion of this Court.

The People seem to believe that there are a lot of items that I own which are simply waiting to be seized to satisfy the restitution. I have no assets at the home I formerly shared with my family. (See affidavit recently filed with the Court.) I have not owned anything at that address since January 12, 2001. Due to my incarceration I have no access to any of the property I need for earning a living. Any property I have are tools of my trade and are of questionable value due to age and condition. The real property where my office was located is going into foreclosure. My equity is questionable due to the property values in Durand. I simply have nothing at present which is available to satisfy the restitution order. The time needed for me to present my case either upon my release and retention of counsel at that time or appointment of counsel at this time, will not change Blue Cross' ability to satisfy their rights. In other words, they are not prejudiced by the Court's grant of this motion for continuance and I earnestly beg the Court to grant this motion and to set a new hearing after I am released, which will be by the end of this year.

MOTION FOR APPOINTMENT OF COUNSEL

I maintain that the whole subject of restitution is part of my criminal case and that my substantial rights are affected. I believe further that remedies still available to me will alter the Court's judgment of restitution, whether or not the Court grants my

motion for remission in whole or part, for reasons set forth below. These are complex issues. I am not qualified to represent myself in these matters. I respectfully beg the Court to either appoint Counsel now or to allow me the opportunity to retain counsel or arrange for representation upon my release from federal incarceration.

MOTION FOR REMISSION OF RESTITUTION

The Crime Victim's Rights Act, 780.766, in part, states that:

"(12) A defendant who is required to pay restitution and who is not in willful default of the payment of restitution may at any time petition the sentencing judge or his or her successor to modify the method of payment. If the court determines that the payment order will impose a manifest hardship on the defendant or his immediate family, and if the court also determines that modifying the method of payment will not impose a manifest hardship upon the victim, the court may modify the method of payment."

The rights of the "victim" in this case, as set forth in paragraph (13) of this Act, if enforced at this time – even though it is impossible to liquidate what I do not have – would run counter to the provisions in paragraph (12) quoted above. Until the Court hears my claim of inability to pay, the "victim" should be

prevented from any further attempt to seek liquidation of my paltry possessions. I believe that it is both proper and lawful for the Court to have the opportunity to decide my petition for a change in the terms of the restitution order before Blue Cross attempts to liquidate or seize anything. Furthermore, it is also appropriate for the Court to have the opportunity to decide whether my changed circumstances, unforeseen at the time this court ordered restitution, should justify a change in its order. (See People v. Grant, 455 Mich at 222).

I am hereby moving this Honorable Court for either (1) an order reducing or eliminating the amount of restitution due to the enormous financial burden that my federal case has and will place upon me, or (2) an order setting the method of payment that takes into consideration my ability to pay, or (3) some combination of the above. I maintain that until the Court has an opportunity to examine the facts, now that formal motions have been made, no further attempts by Blue Cross should be authorized by this Honorable Court.

Since the facts, law, and circumstances involved in these two motions are very complex and beyond my ability to properly articulate and substantiate while I am in federal prison, I respectfully beg the Court's indulgence with respect to either appointing me counsel to argue these

motions or time for me to seek representation upon my imminent release in December.

WHEREFORE, I respectfully beg the Court to grant the relief requested herein and/or for such other and further relief as the Court deems just and equitable.

Dated at Duluth, Minnesota, this 30th day of September, 2005.

s/Jason Hollady
Movant

I certify that I have served a copy of this motion upon counsel for Blue Cross P.O. Box 3021, Detroit, MI 48231-3021, and Asst. A.G. Richard Koenigsknecht, P.O. Box 30218, Lansing, MI 48909, via First Class Mail the date above.

s/Jason Hollady
Jason Holladay, pro se

APPENDIX J

MOTION TO AMEND MOTION FOR APPOINTMENT OF COUNSEL AND ANSWER TO BRIEF IN RESPONSE TO MOTION FOR REMISSION

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF SHIAWASSEE

PEOPLE OF THE STATE OF MICHIGAN

Case No. 00-4893-FH

vs.

DURAND CLINIC, P.C. and
JASON HOLLADY
Defendants

MOTION TO AMEND MOTION FOR APPOINTMENT OF COUNSEL AND ANSWER TO BRIEF IN RESPONSE TO MOTION FOR REMISSION

COMES NOW, Jason Hollady, (unwilling) pro se litigant, who respectfully brings his motions before this Honorable Court.

I. Preliminary statement – In accordance with the mandate of the decision handed down by the United States Supreme Court in Haines v. Kerner, 404 U.S. 519, 520 (1972), because the Petitioner is a pro se litigant without assistance of counsel, this Court based on but not limited to these few reasons must liberally construe the instant motions and all other pleadings, motions, and things alike, rather than hold him to the same standard as an attorney.

II. Motion to amend motion for appointment of counsel

The plaintiffs recent answer to the brief for motion of remission of restitution makes it plain that if a seizure order is issued that my house and office interests are to be sold. This is in response to a judgment handed down by the Court on 5.12.05 and subsequent pleadings. Petitioner has motioned the court for appointment of counsel stating that this is part of my criminal case and that my substantial rights are affected. With the proof that my interest in my house and office are to be sold, there can be no argument that my substantial rights are affected.

There also can be no argument that this arises out of my criminal case. The judgment is due to the restitution order of 5.12.04 by Judge Lostrocco after a

hearing on the proper restitution amount following a criminal conviction of two counts of violating Health Care Fraud statute in Michigan.

I am an unwilling pro se litigant and choose to have counsel. I believed that I had counsel prior to this matter coming before the court. In fact opposing counsel sent all relevant materials to my attorney of record believing that I had counsel. I wrote that attorney asking for representation but only received a copy of the letter to opposing counsel denying that he was the attorney for me.

Inmates "must be assured meaningful access to the courts," see Bounds v. Smith, 430 U.S. 817, 823. There is "concern for the pro se prisoner litigant who also faces the unique handicaps of incarceration." Rand v. Rowland, 154 F3d. 952, 958. And "nothing has changed to make us conclude that the handicaps prisoners face in prosecuting their own cases has diminished." Ibid. "The reality of incarceration is still that prisoners are not at liberty to seek out representation." Rand, p. 958 quoting Jacobsen v. Filler, 790 F.2d 1362, 1364 citing Hudson v. Hardy, 412 F.2d 1091, 1095 stating "prisoners may lack sufficient access to sources of proof needed to demonstrate the existence of a question of material fact."

The incarceration circumstances prohibit access to Michigan statutes and case law.

Interestingly, Rand states that "Pro se prisoner are also limited in their access to legal materials" which is precisely the concern in no being able to even read statute in question or to search out case law or to answer in full allegations made by opposing counsel which may be misleading, incomplete, or even untrue. For example, is it a violation for the "victim" attorney to answer a motion made in a criminal case? Does that violate some law or statute? I can't answer the question because I am limited to my access of legal materials and my attorney essentially abandoned meat the worst possible time. In Bounds, p. 823 Mr. Justice Marshall states the "court reaffirmed that the states must assure the defendant an adequate opportunity to present his claims fairly" citing Ross v. Moffit, 417 U.S. @ 616 and "the tools a prison library requires to be provided are those that inmates need to attach their sentences, directly or collaterally ..."

Request for counsel is made subject to the notice that my substantial rights are affected, that I cannot read Michigan laws or statutes, cannot hire an attorney and all of these issues are documented in substantial case law including that of the Supreme Court of the United States. I therefore have asked for a continuance to find my own attorney with a brief delay in the proceedings or in the alternative, to have one appointed for mr to prevent the obvious due process violation and procedural default occurring here in absence of counsel.

III. Answer to Brief in Response to Motion for remission of restitution

It is impossible to adequately prepare a brief to discuss the assertions made in this brief that was received literally eighteen hours prior to a hearing on the issues especially in light of the limitations on the legal materials I can access. See II. Above. But I must respond to the notion put forward in the brief that I have alleged that the initial and original order of restitution was in error because the ability to pay has ceased to be a factor to consider in ordering restitution. This is an error. This is misleading and an attempt to mislead the court.

To the best of my ability given my limited access to legal materials and no access to the statute in question both People v. Music, 428, Mich. 356 and People v. Grant, 455 Mich. 221 @ HN[10] refer to the remission of restitution and the power to do so resting and residing in M.S.A. 28.1133(5)(b) and M.C.L. § 771.3(5)(b).

Now have these sections been modified? Have these cases become non-controlling? I don't know. I don't have access to the statute but I do know that there is a third part of the statute in addition to 780.766 and 780.767 that I do not have but is referred to as the authorizing or judges part of the statute giving him the direction on what he shall do or must do or can do. It is hard to believe that the State of

Michigan has taken away a Court's authority to remit an order of restitution if there is an unanticipated financial reversal. But the brief presented to the court is false and misleading and makes assertions about what I am saying and getting it 100% wrong.

The questions for the court are 1) Does the court retain the authority to remit all or in part of an order of restitution if there is an unanticipated financial reversal and 2) Does my situation qualify as that sort of unanticipated financial reversal? This motion should be allowed to be fully briefed for the Court without a decision being made that would severely prejudice the defendant. Thank you.

APPENDIX K

NOTICE OF APPEAL AND APPLICATION FOR STAY OF ORDER

Jason Hollady
#31114-039 (208-221)
Federal Prison Camp
P. O. Box 1000
Duluth, MN 55814-1000

STATE OF MICHIGAN

SHIAWASSEE COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN, and
BLUE CROSS BLUE SHIELD OF MICHIGAN,
Restitution Payee

Case No. 00-4893-FH
Case No. 00-4894-FH
Before
Hon Gerald D. Lostracco

NOTICE OF APPEAL and
APPLICATION FOR
STAY OF ORDER

v.

DURAND CLINIC, P.C. and
JASON HOLLADY, M.D.,

Defendants.

COMES NOW, Defendant, Jason Hollady, M.D. appearing pro se, who respectfully brings before this Honorable Court his notice/application.

This Honorable Court entered a final order on September 8, 2005 authorizing seizure and sale of all personal and real property or any interest therein which Defendant may have, accompanied by an order denying Defendant's motion for continuance, motion for appointment of counsel, and motion for remission of restitution (except for the order authorizing seizure and sale of real and personal property, the remainder of the orders were only verbally denied)

Defendant also requests a stay in this order authorizing seizure and sale of real and personal property until this appeal may be heard in Court of Appeals for the State of Michigan.

Dated this day 13th day of Sepetember, 2005 at Duluth, Minnesota.

s/Jason Hollady
Jason Hollady, M.D. Defendant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this notice/application were served upon Jonathan T. Walton Jr. 535 Griswold Street Ste 1550, Detroit, MI 48226 and upon Richard Koenigsknecht, P.O. Box 30218, Lansing, MI 48909, via First Class mail, with postage prepaid, the date above.

s/Jason Hollady
Jason Holladay, pro se

APPENDIX L

LETTERS TO ATTORNEY OF RECORD REQUESTING INFORMATION ON STATE CASE WHILE INCARCERATED IN FPC DULUTH

Jason Lynn Hollady
Federal Register Number 31114-039
Federal Prison Camp – Duluth
Post Office Box 1000
Duluth, Minnesota 55814-1000

January 10, 2005

Gordon Hoy, Attorney at Law
117 West Oliver Street
Owosso, MI 48867

RE: REQUEST FOR DOCUMENTATION

Dear Attorney Hoy:

Please accept this letter as a formal request for various information contained within my client file.

Could you please forward a photostatic copy of the entire client file including all motions, petitions, applications, correspondence, memorandums, and notes to my attention at the address listed above.

I figure that since I have a significant amount of free time, I can spend said time acquainting myself with my case.

In closing, I would like to thank you in advance for your assistance regarding this request.

Sincerely,

s/Jason Hollady

Jason Hollady

January 30, 2005 [in relevant part]

Dear Gordy,

I hope you have received the extension of my probation that I sent you about a week ago. I would include another copy but copies are difficult to arrange here. A lot of my time is now spent in the library researching both my state and federal cases and I have to say that I have learned a lot. We have access only to federal cases, not to Michigan statutes, cases, and law but Susan has found a way to get cases off the internet and I am told a large package of that material is on the way.

Today my letter regards probation law in Michigan and a question about the Michigan rules. Federal law has the Federal Rules of Criminal Procedure which tells you all about how the laws are processed, where to sent motions, what has to be included, update, and appropriate case law. Susan has looked for a similar volume set on Michigan rules but cannot find them, she constantly refers to Michigan Compiled Law which is three bookshelves full of everything including statutes. And I don't know what to tell her to look for or to buy. Can you help with the title of the books, how many there are, the ISDN numbers.

APPENDIX M

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT RESTITUTION ORDER CREATED WHILE INCARCERATED IN FPC DULUTH REVEALING DILIGENCE IN PURSUIT OF JUDICIAL REMEDIES

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JASON LYNN HOLLADY

Petitioner,

Civil Case Number:

v.

UNITED STATES OF AMERICA

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO VACATE, SET ASIDE,
OR CORRECT RESTITUTION ORDER

Does the Crime Victim's Rights Act MCL 780.766 and 780.767 authorize restitution awards for other than the specific conduct underlying the conviction?

The Michigan Supreme Court (MSC) in People v. Gahan, 456 Mich. 264 "ordered defendant to compensate for all losses attributable to his illegal scheme that culminated in his conviction ... even though some losses were not factual foundation of charge that resulted in conviction." Petitioner avers that this decision is in conflict with the United States Supreme Court holding in US v. Hughey, 495 U.S. 411 and that the defendant's restitution order must be vacated and he must be re-sentenced to an amount consistent with the laws of the land.

The MSC cited three federal cases stating "the federal courts have interpreted the federal statute narrowly" while remaining silent on Hughey. They stated, "We conclude that the absence of the phrase 'course of conduct' and the use of the phrase 'such offense' distinguishes the intent of the federal statute from the more broadly worded Michigan statute" p. 271. Further, the MSC notes that the "course of conduct" phrase "having acquired a unique meaning at common law, the meaning is carried over to the interpretation of the subsequent statute dealing with the same subject matter absent any direction to the contrary by the Legislature" p.272. Petitioner avers that the direction comes directly from the United States Supreme Court.

Prior to Hughey, the Federal Circuit Courts were split on the question of whether a defendant charged with multiple offenses may be required to

make restitution for acts of which he was not found guilty. Hughey notes this split stating the Fifth Circuit decision in the case follows the decisions of the Second and Tenth Circuits. See US v. Berrios, 869 F2d 25, 32 (1989) "(permitting the court to order restitution for losses beyond those specified in the charge on which the defendant is convicted where the victim of that offense also suffered other losses as a result of the defendant's related course of conduct)" (emphasis mine) p.415. The Fifth Circuit in their Hughey decision 877 F2d 1256 permitted a "court to require restitution beyond that amount involved in the offense of conviction when there is significant restitution" p.1264 (1989).

Hughey reversed the decisions of the Fifth and Second Circuits holding that a "restitution award is authorized only for the loss caused by the specific conduct that is the basis of the conviction" p.412 noting that the "language clearly links restitution to the offense of conviction" p.412 and the "loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order" p.420.

The language of the statute referenced is now § 3663(a) which states in part "... in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense ..."p.415, 416 while the Michigan statute states "in addition to or in lieu of any other penalty authorized by law or in

addition to any penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction ..." CVRA 780.766 Section 16 (2).

The Federal statute went on to indicate that the court in ordering the restitution of the defendant "shall consider the amount of the loss sustained by any victim as a result of the offense ... and such other factors as the court deems appropriate" p.416-417. This became known as the "catchall phrase" and suggests that the Federal statute in fact, is much more broadly worded than the Michigan statute which reads "In determining that amount of restitution to order under Section 16, the court shall consider the amount of the loss sustained by any victim as a result of the offense" CVRA 780.767 Section 17(1). Nowhere is thee such broad language in the Michigan statute as in the Federal statute and still the United States Supreme Court held that it was the offense of conviction and the specific conduct underlying that conviction that established the outer limits of the award.

The Court rejected restitution for a related "course of conduct" or acts that had a significant connection between the crime of conviction and similar acts. It held that the language of the provisions "establish the amount of the restitution that courts can award for various losses caused by the offense" p.418. Hughey noted that the first

consideration in setting restitution, and it is both in the Federal and Michigan statute, is "the amount of loss sustained by any victim as a result of the offense" p.418. This language suggests persuasively that Congress intended restitution to be tied to the loss caused by the offense of conviction. Again, note the exact same wording is both in the State and Federal statute. "Indeed, had Congress intended to permit a victim to recover losses stemming from all conduct attributable to the defendant, including conduct unrelated to the offense of conviction, Congress would likely have chosen language other than 'the offense', which refers without question to the offense of conviction" p.418 (boldface mine). Please refer to the Michigan statute in comparison with the Federal statute which notes "the offense" defined as the offense of conviction, see Hughey, citing US v. Berrios, FN 2 p.414.

The government in the Hughey case conceded that the definition of "such offense" and "the offense" is the offense of conviction p. 415. Can we doubt that Michigan's use of the word "crime" can be construed as anything other than the crime of conviction as noted in Berrios" Petitioner avers that the meaning of the statute is clear and as in the Hughey case, it is only that specific conduct underlying the conviction that allows a restitution award.

The similarity of the State and Federal statutes is overwhelming. I have included a copy of

each for the Court to make its own comparison. Please refer to Federal statute 3(b)(1) and its counterpart in the CBRA (3). The language is almost identical and in each place the Federal statute refers to the "offense" the Michigan statute refers to the "crime" which is the crime of conviction. A close reading of Hughey notes that the government's assertions mostly rely on the "catchall phrase" which allows the Federal judge to consider other factors as the court deems appropriate and despite this broad reaching language that does not exist anywhere in the Michigan statute, Hughey rejected that contention and continued to focus only on the conviction.

Hughey also rejects the contention that "courts cannot compensate victims for the full losses they suffered as a result of the defendant's conduct" and that the plea bargaining "wholly undermine(s) victims' ability to recover fully for their losses because prosecutors often drop charges of which a defendant may be guilty in exchange for a plea to one or more of the charges" p. 421. Hughey citing Berrios, 869 F2d 25, 30 (1989), "if a prosecutor chooses to charge a fewer than the maximum possible number of crimes, the potential recovery of victims of crime is undoubtedly limited, but so too is the potential sentence that may be imposed on a defendant. And although a plea agreement does operate to limit the acts for which a court may order a defendant to pay restitution, it also ensures that

restitution will be ordered as to the count or counts to which the defendant pleads guilty pursuant to the agreement. The essence of a plea agreement is that both the prosecution and the defense make concessions to avoid potential losses" p. 421.

The Circuits moved to reverse their previous broad interpretations of restitution awards "court may not authorize restitution for losses from crimes for which defendant is not convicted, even if those other crimes are significantly related to crimes of conviction", US v. Young, 953 F2d 1288 (11th Circuit 1992). Gall v. US, 21 F3D 107 (6th Circuit 1994), citing US v. Guardino "stated its belief that the Supreme Court in Hughey ... 'strongly implied that a restitution order may not go beyond the counts of conviction under any circumstances', "US v. Guardino, 972 F2d 682, 687 (6th Circuit, 1992). In US v. Reed, 80 F3d 1419, 1422, citing US v. Clark, 957 F2d 248 (6th Circuit 1992), referring to the US v. Durham, 755 F2d 511 (6th Circuit, 1985), "repudiated its broad reading" and "forecloses so broad an interpretation of Durham. Indeed, the Court in Hughey explicitly repudiated such a course, finding its narrow reading of the Act more consistent than ... "one that permits an open-ended inquiry into losses resulting from the defendant's related course of conduct or from acts that had a significant connection to the act for which the conviction was had'," Clark at 253. A court exceeds the scope of its authority "when

it orders restitution for uncharged offenses" Young, p. 1289.

APPENDIX N

AFFIDAVIT OF JASON HOLLADY SUBMITTED TO EASTERN DISTRICT AND SIXTH CIRCUIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JASON HOLLADY and
DURAND CLINIC, P.C.,

Petitioners,

CASE NO. 07-15300

v.

PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

PEOPLE OF THE STATE OF MICHIGAN,

Respondent

_____/

AFFIDAVIT OF JASON HOLLADY

On November 18, 2004, I surrendered to Federal Prison Camp in Duluth, MN where I stayed until November 18, 2005.

I was released from federal custody on December 20, 2005 - ten days after December 10, 2005 final date available to file state habeas and toll one-year AEDPA limitation.

I was in federal custody for the entire one-year AEDPA imposed year.

The Duluth Federal Prison Camp law library [FPC] contained information on federal law, procedures, rules, and cases only.

There was no access to Michigan law, statutes, procedures, rules, cases, or any other source of Michigan law in Duluth FPC.

Prison officials ignored my repeated oral and written requests to obtain State of Michigan legal materials.

Upon arrival in Duluth, I wrote the attorney of record for all case materials including process for state postconviction review.

Attorney sent May 2004 Opinion and Order, plea, and sentencing transcripts but no habeas information.

I had no knowledge of Michigan law, procedures, or statutes. I could use the Duluth FPC legal materials to study federal law but I had no source of Michigan law.

I used those materials to timely file a still pending §2255 based on Cotton, Apprendi, and progeny in January 2005.

There was no information in Duluth FPC that would allow me to learn whether it was possible to challenge a Michigan conviction and/or sentence.

There were no Michigan procedural or substantive rules available.

I did not know and could not find out in Duluth if Michigan had habeas procedure.

I found out only after release from federal custody that the "vehicle" to challenge a conviction and sentence was MCR 6.500 and the substantive and procedural rules were listed in the Michigan Court Rules - MCR 6.500 and Michigan appellate rules.

While in Duluth, I became aware of the AEDPA one-year limitation on filing a challenge to a state conviction and sentence for purposes of tolling AEDPA imposed one-year limitation.

I could not access Michigan appellate rules preventing me from accurately calculating the date on which the conviction was final for AEDPA purposes.

I did not know if the lack of filing while in Duluth would harm my chance for federal habeas if state of Michigan denied my petition.

I assumed that the state conviction was final for AEDPA purposes on or about October 15, 2004 – one year from the date of Michigan Court of Appeals denied late appeal.

When Blue Cross filed a motion to collect on restitution during April 2005, I filed pleadings from Duluth FPC challenging sentence.

I challenged my conviction and sentence as an affirmative defense in opposition to Blue Cross motion months before expiration of the one-year AEDPA limitation.

I told the trial court in pleadings and during the telephone hearing that the criminal matter was not over; there were criminal issues affecting conviction and sentence to be decided that no court had ever ruled on.

Because I had no knowledge of existence of Michigan state habeas, no access to statute or procedures, was unable to research all the necessary relevant issues, and would not have been able to answer any State response, I felt that I would risk summary dismissal with prejudice with an improper filing.

I read U.S. Supreme Court case Bounds v. Smith to come to that conclusion. With access to MCR 6.500, Petitioner would have filed Michigan habeas petition just as he filed timely § 2255 because legal information was available.

My pleadings and telephone hearing statements in 2005 were intended to notify the court of a constitutional challenge to conviction and sentence.

I remained terribly concerned while I was in federal custody about summary dismissal with prejudice after reading Bounds v. Smith.

That is why I didn't file a document labeled "habeas" in all three levels of Michigan courts: trial, Appeals, and Supreme Court.

In reading only federal law, I noticed differences between how my case was handled in indictment, plea, and restitution issues in Michigan and how federal cases are handled.

I could not determine whether Michigan had a good reason for the differences in indictment, plea, and restitution hearing processes that I experienced that were different from federal law.

I could not determine if Michigan laws and procedures were unconstitutional because I could not

read any Michigan law or cases except those few that were sent to me and not destroyed by prison officials.

I tried to get Michigan law, procedures, and cases sent to me in Duluth from attorney, court clerk, other attorneys, and asked friend Susan Williams to call attorney and Shiawassee County court clerk.

I sent many letters to my friend Susan asking her to send Michigan legal materials specifically focused on the legal issues I had identified and on finding out the "rules" that would tell me if further appeal was available and how to file such a claim.

I asked her repeatedly to find information on filing "habeas" challenge to conviction and sentence.

She was able to send me Gahan and a few other Michigan cases.

She was unable to learn of the existence of a vehicle to challenge a Michigan conviction or sentence.

She was unable to find relevant rules or procedures for filing habeas or to find appellate court rules.

Prison officials destroyed much of the legal mail she sent to me. Prisoners were not allowed to receive legal mail from nonlawyers.

She told me she called Gordy Hoy and he was unable or unwilling to help file habeas or send me information on habeas.

She told me she called and spoke with Ms. Ostrander, the Shiawassee County clerk. Ms. Ostrander, she told me, was unable or unwilling to provide habeas materials to Susan or to me.

I wrote Ms. Ostrander in August 2005 to ask for habeas after she turned down Susan but never received a reply.

The following are quotes from letters to Susan Williams during 2004-2005 incarceration in Duluth Federal Prison Camp:

12/18/04
"Gordy argued Michigan law which says the judge can grant "easily ascertainable." But Hughey says he can only grant what is easily ascertainable from the conviction itself which for me, is 2 counts of health care fraud or about $75.00. It's what I have thought all along, Mr. Hoffman made that point at sentencing 1/12/01 but Gordy didn't elaborate, didn't mention Hughey. I may have to use ineffective assistance of counsel, lose another friend probably but he screwed up by not using this case, it is a famous case."

12/19/04
"I know enough now to know the [restitution order for $317,461] is illegal and wrong. Since I [assume I] missed the time for [direct] appeal I am unclear how I go about working this out but I think it is possible ..."

1/6/05
1) Under the MVRA, mandatory victims restitution act, they are to notify me of WHICH COUNTS I am liable for restitution for and what amount. They didn't.

2) Under US Supreme Court law "similar conduct" is restricted to only the counts I pled guilty to. If you are charged with 10 counts of stealing from 10 different banks and you plead to one count - that bank and the amount you stole is all you can be made to pay restitution for. The other banks can sue you in civil court if they want to.

3) Under federal law, restitution is part of the sentence and a sentence that includes an incorrect restitution figure is illegal. Illegal sentences can be fixed at any time and only those portions that are illegal or unauthorized have to be changed.

Gordy ... failed to notify the court of the Supreme Court cases, it is ineffective assistance of counsel.

I have lots of federal cases that are right on point but I need state court information - rules, laws, precedents, all of that.

"By now I assume you have been/are going to Thomas Cooley Law School to buy my Michigan Criminal Procedure book. It will be a book full of rules on how to conduct law business in Michigan. [The book] will have all the rules that govern how you file lawsuits, what info is needed, etc. etc."

"We have the capacity to write the motion and submit it [from Duluth]. We don't have access to Michigan law ... and don't have information to start the process."

1/14/05
I don't have enough Michigan case law information to write the powerful motion/brief I want. I need cases in Michigan, to two I mentioned to start with, and any other significant case on RESTITUTION. I especially need cases after 1990.

"I sent all the facts of the state case to [attorney] Mr. Grossman" to ask him to represent or tell me how to file in the state."

1/20/05
"I am working on the state case quite hard. I have and will have lots of federal knowledge of cases, case decisions ... But I don't know Michigan rules ... I have

a great case to overturn the 317K in restitution ... I am starting to look into the possibility of reversing my state conviction ..."

1/24/05
"I will ask for a letter from him [Gordy Hoy] telling me what to do."

1/31/05
"Learning the procedure is almost more difficult than the law itself. I now can call up cases and look at the law and see if it agrees or disagrees with my position which is a far cry from setting that down on paper using the right vehicle and the proper form."

"You have to be tired of me asking for the rules of criminal procedure in Michigan. It is in those pages that spell out which forms, which techniques, which vehicle is the proper way to get back to court."

"I will continue to poke around, trying to learn more to see if I have a claim to overturn the conviction, indictment issues, plea bargain issues."

2/2/05
" ... how do you know Judge Taylor of the Michigan Supreme court really erred that badly [in the Gahan case]?"

"I have read for hours and hours on this restitution issue in the federal courts. I have read Hughey 10

times. I have seen how it has been applied by the [federal] Circuit Courts of Appeals throughout the land. Time and again they have decided cases with the facts of Gahan in exactly the opposite way. I've traced the history of the statute. I've read and reread the implementing language, devoured the footnotes, read the cross references, searched and Shephardized all the important cited cases and there can be no doubt."

"There is a procedure that allows you to move cases from state to federal court at some point but of course I don't know how that works. It will be what I have to do most likely if I want to prevail here."

"... it would be the perfect time to motion for all the following things [if I knew how]"

1) Motion to Vacate Sentence, Restitution portion
2) Motion to Change the payment schedule
3) Motion to have direct appeal on the Easily Ascertainable standard [only issue in the late appeal]
4)Ineffective assistance of Counsel in regards to not bringing up the Hughey line of cases, not filing a proper and timely appeal
5) [ ]
6) [ ] The Booker standard Motion to vacate restitution portion of sentence base[d] on preponderance of evidence standard used."

"So there is a lot of work to be done to get all of this together. So, one scenario that I have thought of is if we find these guys [Michigan lawyers] that I would ask you, [ ], to go meet with them. I would prepare a brief or outline a brief that you would take to the attorney ..."

2/3/05
[Please find the] "Rules, Hon, Rules. They start MSA - Code of Criminal Procedure is the title."

"I looked up [federal] cases that the Michigan Supreme Court used in their Gahan opinion. It is amazing that our court could look at those facts so differently than the federal courts. The two small differences [in Michigan's CVRA] were the exact two differences that were the subject of the Hughey opinion in the Supreme Court, seven years before the Michigan decision. What? We live in a different country in Michigan not subject to the USA laws?"

"The problem is not knowing the specific rules, deadlines, structure of the appeals, all the procedural stuff. I can't miss deadlines ... "

2/5/05
"I'm ready to actively [fight restitution award] with a bit more information"

3/9/05
"We need to be able to 1) type motions in proper form and 2) file motions properly."

"I need all the Gahan cases that mention Headnotes 1, 3, and 5. Will you call [Gahan's attorney Arthur] Landau? I need controlling cases on restitution. I have to hold off writing my brief till we do all this. I am going to write eight different motions."

3/10/05
"If I know what all the state decisions and rules are, I can construct arguments that will give a judge something to consider."

3/13/05
"Here are pages 2-4 of motion number one. Hopefully you already have page 1 or its in an unopened envelope. I ask that you type this in the word processor using the style the courts use. Sometime in the next 60-90 days I'll ask you to call the courthouse in Corunna [Shiawassee County Court]. You'll ask for the woman who takes the motions and you'll tell her you are pro se. What does she need to file a motion?"

3/30/05 [in part]:
"After Hughey, the Circuits immediately moved to reverse their previous broad interpretation of restitution awards. 'Court may not authorize restitution for losses from crimes for which defendant is not convicted, even if these other crimes are

significantly related to the crimes of conviction,' U.S. v. Young, 953 F2d. 1288 (11th Cir. 1992). 'Restitution orders will be impermissible if district court bases its determination of losses on conduct outside the offense of conviction ...' U.S. v. Silkowski, 32 F3d. 682. 'Restitution orders ... which encompass losses stemming from charges not resulting in convictions is unauthorized ...' U.S. v. Wainwright, 938 F2d. 1096 (10th Cir. 1991). U.S. v. Tunney, 69 F3d. 107, 116 (6th Cir. 1995) held that 'the district court erred by ordering the defendant to pay restitution representing losses that resulted from conduct that formed the basis of counts that were dismissed ...' U.S. v. Comer, 93 F3d. 1271 (6th Cir. 1996) held that it was "error" to impose restitution based upon losses resulting from a charge of which defendant was acquitted.'"

4/16/05
"I just don't know [in] which Court [to file] and now we have to make sure we do everything correct procedurally. One of your TO DO's will be to contact Shiawassee County court and find out what pieces of paper must be served and where. We will need to know this at every step and we'll have to know the dates - how long we have to do each thing."

6/21/05
"Call Gordy and make sure he is representing me please. Ask him to represent me to set aside the judgment. Tell him that I have arguments to make

indicating the order of restitution was not correct but I can't argue effectively from here. I have no access to Michigan cases and [he can] get the judge to postpone this thing and set aside the judgment."

"I plan to file additional motions ... [ask Gordy] to let me know how to set aside this judgment until I get back."

8/18/05
I think I am supposed to "appeal to the Michigan Court of Appeals. If I appeal in Lansing, I may need you to call there and see how long I have to appeal."

"It is time for us to learn to file motions. Call the Clerk of the Court for the Michigan Court of Appeals and ask them what we need to file ..."

8/23/05
"[T]here is serious question about the validity of the [restitution] judgment ... there are significant issues to bring to bring including but not limited to ineffective assistance of counsel ..., failure to bring in front of the court significant legal reasons why the award of restitution was unauthorized."

"Motions that must be written asking to vacate the restitution award as unauthorized:

1) Ineffective assistance of counsel for filing late. Request my direct appeal rights be restored.

2) Restitution award violates federal law and Constitution a) US v Hughey decided in 1991 stated that restitution award only authorized for the specific conduct underlying the conviction. Dismissed or uncharged conduct cannot be included in a restitution order award. b) Award violates right to a jury trial and the Sixth Amendment. The Apprendi/Blakely/Booker line of cases establish that the statutory maximum for a criminal sentence is the amount proved to a jury beyond a reasonable doubt or admitted by the defendant. The Judge cannot be a fact finder in a criminal sentence. A restitution award is part of a criminal sentence. c) In federal law, US v. Hughey's finding can be overcome in one of two ways 1) the defendant agrees with the amount of restitution or 2) the government charges the defendant with a conspiracy that must appear that way in the indictment or information. Neither was present in this case. Health Care Fraud is not treated as a conspiracy and was not charged that way in the indictment, rather, 32 specific counts were alleged and thirty were dismissed and are civil conduct. 3) The plea should be allowed to be removed at this time for lack of notice at the plea colloquy. Notice must be given during the plea colloquy of the maximum punishment a defendant may receive. This did not occur and therefore the Court did not receive a voluntary and knowing plea. This is harmful error and affects the defendants substantial rights

according to federal law and the remedy is to vacate the conviction."

[On August 23, 2005, I sent a letter to attorney Arthur Landau who represented Defendant Gahan in People v. Gahan asking several questions about the case. I included this statement: "My plan is to bring this [discrepancy between state and federal law in restitution] to the attention of the court." I asked for representation but never heard back.]

8/24/05
"I have written a letter to Arthur Landau who was the attorney on the Gahan case. I asked him some questions, asked him to represent, and gave him your cell number so if he calls you will know what it is about."

8/26/05
"States have habeas corpus petitions. And they often have a form for a habeas petition. They, at least some of them have rules or dates that must be followed. I need to find out what those are. So that is why I am asking you to call [Shiawassee County Clerk] Sandy and ask her for a form for a habeas petition.

U.S. v. Hughey was a Supreme Court decision that set the law of the land. Our state ruling at the Supreme Court of Michigan level was the exact opposite, allowing broad restitution order for relevant conduct if the judge felt there was relevant conduct

that should be added to the restitution. But as you know, the US Supreme Court said no. There is what we call the Supremacy Clause in the US Constitution that says when the two conflict, the federal law wins and the state law is preempted. The question is why the state made such a ruling given that it was made in 1997 and Hughey was written in 1991. Really, there is not that much difference in the two laws, the wording is essentially the same.

8/27/05
"I am limited here because mostly what I am doing is fighting a state case with all federal books ..."

"Please do call Sandy about the habeas corpus form and call [attorney] Mr. Miller about the habeas as a vehicle for getting back in court and the deadlines involved ..."

8/30/05
"The motion for remission of the restitution order is powerful."

8/31/05
"I do need real bad the habeas information ..."

9/5/05
"As you know in US v Hughey, the Supreme Court said that the only restitution that is authorized is for the specific conduct underlying the conviction. They can't make you pay for uncharged conduct or

dismissed conduct. But they did. So the state rule, state law, state statute as interpreted by the Michigan Supreme Court is in direct violation of the holding of Congress as interpreted by the Supreme Court. That is the question I have researched extensively in the past few weeks preparing for [the] September 8th [telephone hearing]."

"I should tell you too that I have found that they violated another rule of federal law in my plea hearing and they may have to reverse my conviction."

9/8/05
"So TO DO, TO DO [list of things to accomplish at home], I need that habeas stuff. The habeas corpus procedure is a way at attacking aspects of your sentence."

9/14/05
"Without getting too technical, the lack of notice that he [trial court] was going to hang me with a restitution award of 347K back then was a violation of a federal plea colloquy. It is my first motion I want to make when I get out of here or sooner for I don't want to miss any habeas dates there are.

Secondly, the Congress has written a restitution statute that was interpreted in 1980 in US v Hughey 495 US 411 that said the only authorized award of restitution had to be for the specific conduct

underlying the conviction. For me, that's $75. That's my second motion. But there is a lot I don't know.

The controlling case is People v. Gahan which was the controlling case as late as 2002. I wrote Mr. Landau, Gahan's attorney to ask him if he took it federal and what was the outcome and if not, why not? I don't know that the Supremacy Clause in the Constitution applies in this case but my research here suggests that it applies any time a state law is in conflict with a federal regulation or statute as interpreted by the United States Supreme Court. Then the state law is preempted. But I don't know.

I have another motion regarding Apprendi that correlates with Hughey but I'll save that for later. I just can't research that from here. There is no access to legal materials from the state of Michigan."

9/15/05
"I still need habeas corpus information and more restitution stuff ... you should be able to search 'habeas corpus' online and come up with what I need so I can make sure that I don't miss any dates."

10/17/05
"Please give [attorney] Tom [Padgett] a call to see if he will represent me."

In the library, I read and took notes on U.S. Supreme Court and Federal Circuit cases on indictment, pleas,

restitution, ineffective assistance of counsel, and other relevant matters but could only access federal materials.

I wrote several drafts of briefs citing only federal sources with the intention of filing state action if there were one available.

I did not know how or where to file a claim; I did not know and could not find out if my claim had merit; I did not know procedural rules required to prevent summary dismissal with prejudice. I did not have access to information necessary to respond to any State reply to a claim.

My attorney never sent habeas information in response to my letters.

In about April, 2005, Blue Cross Blue Shield commenced an action seeking to collect on unpaid restitution.
I sent several letters/briefs to the judge asking for adjournment.

6/27/05 MEMORANDUM OF LAW IN SUPPORT TO ANSWER MOTION
See 10. "There are serious legal issues brought in front of this court ..."

7/1/05 Letter to Judge
Renewed request for postponement until after 12/19/05 asserting no access to Michigan law or statutes. I asked him to appoint counsel in this matter.

Judge granted a continuance until September 8, 2005.

I sent a letter to the judge on July 27, 2005.

I asked for another adjournment of the matter until after my release and notified the judge that "I will ... bring a number of legal issues to the Court's attention."

I still did not know if habeas was available in Michigan or which Court would have jurisdiction.

I filed briefs with the court in preparation for the hearing. Quotes or statements from 2005 pleadings and letters to the judge:

6-21-05
Letter to Judge Lostrocco - "If [Gordy Hoy] represents me, then I ask for postponement so I may confer with my attorney."

"... request postponement until my sentence is completed 12/19/05."

Gordy Hoy sent a letter to the court saying he was not representing me. He never resigned to my knowledge.

The purpose of the delay requested would have been to confer with attorney and find out how to file a challenge to unconstitutional conviction and sentence.

An unconstitutional conviction and sentence is an affirmative defense to Blue Cross motions to collect on unconstitutional restitution award arising from criminal conviction.

MOTION FOR CONTINUANCE and MOTION FOR APPOINTMENT OF COUNSEL and MOTION FOR REMISSION OF RESTITUTION were filed by Petitioner.

"There are matters which I believe entitle me to be heard and I do not desire to have my rights in these matters compromised because I cannot at present afford [or retain] counsel."

Cited People v. Grant [case Susan sent] which a later legislative amendment had made irrelevant and demonstrated Petitioner inability to file proper pleadings and proving lack of relevant materials in Duluth FPC library to file proper challenge to conviction and sentence.

Requested "the time needed for me to present my case either upon my release or retention of counsel ..."

"I beg the Court to grant this motion and to set a new hearing after I am released ..."

"I maintain that the whole subject of restitution is part of my criminal case and that my substantial rights are affected. I believe further that remedies still available to me will alter the Court's judgment of restitution ..."

"I maintain that until the Court has an opportunity to examine the facts, now that formal motions have been made ..."

Statement in MOTION TO AMEND AND SUPPLEMENT MOTION FOR REMISSION OF RESTITUTION:

Cited Haines v. Kerner requesting Court to liberally construe all pleadings.

Statements in REPLY OF DEFENDANT TO RESTITUTION PAYEE BLUE CROSS

"More relevant to the instant matter is the fact that Defendant believes that he will prevail in his appeal on one or more grounds ..."

"Defendant has only asked the Court and BCBSM for a delay until he may obtain representation and appear personally to argue his position and his rights."

"Defendant does not have access either to the evidence upon which the Court relied or to Michigan law."

Made request for a stay of "all consequential actions" and asked for "further relief as the Court deems just and equitable."

Statements were phrased this way only because of Bounds and concern about dismissal with prejudice.

Statements in MOTION TO AMEND MOTION FOR APPOINTMENT OF COUNSEL and ANSWER TO BRIEF IN RESPONSE TO MOTION FOR REMISSION

Cited Haines v. Kerner to "'liberally construe' pleadings, motions, and things alike."

"Petitioner has motioned the court ... stating that this is part of my criminal case and that my substantial rights are affected."

"There can be no argument that this arises out of my criminal case. The judgment is due to the restitution order of 5.12.04 by Judge Lostrocco after a hearing on

the proper restitution amount following a criminal conviction of two counts of violating Health Care Fraud statute in Michigan."

Cited Bounds v Smith, 430 U.S. 817, 823 and Rand v. Rowland, 154 F3d. 952, 958 asserting "unique handicaps of incarceration; nothing has changed to make us conclude that the handicaps prisoners face in prosecuting their own cases has diminished." Quoted Rand, at 958 citing Jacobsen v. Filler, 790 F2d. 1362, 1364 citing Hudson v. Hardy, 412 F2d. 1091, 1095 stating "prisoners may lack sufficient access to sources of proof needed to demonstrate the existence of a question of material fact."

Bounds, at 823 "Court reaffirmed that the states must assure the defendant an adequate opportunity to present claims fairly" citing Ross v. Moffit, 417 U.S. at 616 "the tools a prison library requires to be provided are those that inmates need to attack their sentences directly or collaterally."

Statement in NOTICE OF APPEAL AND APPLICATION FOR STAY OF ORDER

Requested a stay in 9/8/05 decision to deny "motion for remission of restitution ..."

There was no response to my attempt to "appeal" order from telephone hearing from trial or appeals courts.

Lack of response to this "appeal" proved to Petitioner that there was no way to guess if there was habeas or how or where to file.

TELEPHONE HEARING

Telephone connection line was terrible. Phones were switched twice. Court called back twice without improvement to line quality and judge was told several times that Petitioner could not hear. Petitioner heard only portions of the proceedings and could not be sure what was said, what was meant, even what was the subject of discussion or if Petitioner's statements were being understood. Transcript is in court criminal record and reviewed by Petitioner in January 2008. I was not allowed by court clerk to make copies. Obtaining a copy is possible but cost prohibitive for indigent Petitioner.

In telephone hearing, transcriptionist failed to record all my statements including assertions of constitutional violations and need for habeas information.

In telephone hearing on September 8, 2005 I made the following statements to the court. [Quotes from Petitioner and Judge with transcript page numbers]:

p.8 "I have no access to Michigan law or statutes ..."

9 "There is no question that I am denied the ability to defend myself adequately."
12 "With respect to [Michigan Assistant Attorney General] Mr. Koenigschnecht, the criminal matter is not over." Assistant Attorney General was present in the court during telephone hearing.

22-23 Judge: "to my knowledge, there has been no appeal in relation to that, and we would be beyond the appeal of right and, for that matter, beyond the time for any appeal by leave to have been filed."

23 "I have several motions for relief that are on point and I believe will persuade the Judge to alter, amend, or cancel the restitution order. That does not include my present motion for remission of restitution ..."

24 "there should be motions in the criminal matter ..."

25 "the plan is to bring two, three, four motions on the restitution matter and other matters that are criminal and not civil ..."

26 " it is well documented that 'prisoners are not at liberty to seek out representation and unable to retain counsel even if they had the financial means to do so. Prisoners are limited in their access to legal materials.'"

27 "I cannot read the statutes. I can't read the case law; I have no access to any of that material, Your Honor."

Judge: "You must have some access, you quoted from case law ..."

"It's all federal, Your Honor, there's nothing from Michigan here."

"What about the rest of the statement I have to make?"

Judge: "If you want to submit a supplementary brief you are welcome to do so."

Judge threatens to end proceeding: "Do you want to move on to the next issue, doctor, or do you want me to conclude the proceeding?"

31 "I have the right to notify the Judge and ask for modification of payment. I am doing that today. And I have several other matters to be brought before you."

This statement demonstrated my inability to know Michigan law. My assertion was from a case that was superseded by later legislative amendment unavailable to me in Duluth.

33 "And I have several motions that are, are criminal related, Your Honor, not civil ... [that]" ... violates several constitutional protections ..."

"There is no reason not to delay. It puts BC at no disadvantage to wait 'til I get out of here, get an attorney, and come back with important motions."
"Could you ask Counsel to send me copies of how that works" [referring to filing postconviction motions].

My belief was that the Judge understood that I had motions for relief from judgment to present to the Michigan court with jurisdiction. The following statement by the judge is what made me think that he understood.

Judge: "So that ... would get you, you know, well past your present incarceration, well beyond halfway house, and well into your being merged with the community from federal prison."

[Difficulty hearing continued throughout. Couldn't hear judge's words.] "Well, uh, what I meant was the, the, procedures you just described and ask to the, is, is it possible for him to send those to me, please?"

Because statements of the judge and opposing counsel were hard to hear, I assumed the Court was referring to the "procedures" I had requested - to dispute the restitution and conviction orders for purposes of challenging conviction and sentence.

When the judge stated that all time for appeals had passed, it suggested to me that Michigan did not have habeas and I had no vehicle for relief.

I was very intimidated during the telephone hearing.

My fear and intimidation was due to being in a federal penitentiary talking to a judge on the phone in front of prison official who wanted hearing to end now; judge appeared to be impatient probably due to poor phone line; Petitioner could not hear; nor could anyone else. I couldn't hear the judge or opposing counsel or Michigan Attorney General for most of the hearing.

I asked the judge after the hearing how to file a challenge to conviction and sentence.

I do not know if he heard me. Transcriptionist did not record question.

I asked to speak to opposing counsel; judge hung up and the Court called back; I asked Mr. Walton to send habeas materials but he sent only forfeiture information.

I made statements requesting habeas that were not captured on transcription.

Unconstitutional conviction and sentence are affirmative defense to Blue Cross motion for collection on restitution.

I still feared summary dismissal; still did not know where or what to file to challenge a state conviction and sentence.

If I had known that the trial court was the place to start habeas challenge, I would have filed briefs in the trial court with all my constitutional challenges to conviction and sentence and labeled them "habeas challenge to conviction and sentence under MCR 6.500."

All materials described herein were found in Shiawassee County criminal files 00-4893-FH; 00-4894-FH.

My written and oral statements from Duluth were intended to notify the court of my challenge to conviction and sentence.

I requested the courts' help and attorney of record help to obtain the relevant law needed to timely and properly file habeas claim but no help was offered.

To test if I could properly appeal, I sent in an "appeal" and request for a "stay" to the Michigan Court of Appeals appealing the 9/8/05 ruling.

No action was ever taken on the "appeal." I never heard from trial or appeals courts.

In the absence of access to Michigan law and with no response to my "appeal," I was persuaded that there were laws and procedures I simply did not know and could not find out regarding filing of my claim against conviction and restitution award.

On August 23, 2005, I sent a letter to attorney Arthur Landau who represented Defendant Gahan in People v. Gahan asking several questions about the case. I included this statement: "My plan is to bring this [discrepancy between state and federal law in restitution] to the attention of the court." I asked for representation but never heard back.

On November 18, 2007, I was transferred to a halfway house in Saginaw, MI without a library or access to any legal information.

All of my legal materials were sent to my home address.

I was not allowed to leave the building until after AEDPA deadline of December 10, 2005.

Release from federal custody occurred December 20, 2005.

I filed the motions for relief from judgment on February 27, 2006 which should be considered supplementary to 2005 pleadings.

I declare that all the statements within are true to

the best of my information, knowledge, and belief.

s/Jason Hollady

Jason Hollady
Defendant-Appellant
213 Mercer Street
Durand, MI 48429
May 29, 2008
May 21, 2009

APPENDIX O

AFFIDAVIT OF SUSAN WILLIAMS DOCUMENTING ATTEMPT TO OBTAIN MICHIGAN HABEAS STATUTE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JASON HOLLADY and
DURAND CLINIC, P.C.,

Petitioners,

CASE NO. 07-15300

v.

PAUL D. BORMAN
UNITED STATES
DISTRICT JUDGE

PEOPLE OF THE STATE OF MICHIGAN,

Respondent

_____/

AFFIDAVIT OF SUSAN WILLIAMS

I have known Jason Hollady since November 2003.

During his months in Duluth Federal Prison Camp, we spoke on the telephone almost daily, wrote each other five to seven times per week, and I visited him seven times.

Soon after Jason arrived in Duluth, he began writing and telling me that he had found federal legal cases that contradicted how he was treated in his Michigan legal case.

He repeatedly asked me to send him Michigan legal information including cases, rules, and statutes so that he could find out if and how he could file a challenge to his conviction and sentence in Michigan.

He told me that he didn't know and couldn't find out if there was a vehicle that would allow him to challenge his conviction and sentence.

I went to the Oakland County law library multiple times attempting to find the information he needed.

I called the Shiawassee County court clerk, Sandy Ostrander, and asked her how a federal inmate would file a challenge to a conviction and/or sentence. She was unable or unwilling to help.

I called attorney offices including Demosthenes Lorandos, Robert Miller, and Charles Grossman to ask them to represent him in the state. All were unable or unwilling to help.

I called the office of his attorney of record Gordon Hoy and asked him to tell me or to write Jason and tell him what he needed to know to file a challenge in the state of Michigan against his conviction and/or sentence. He was unable or unwilling to help.

Jason repeatedly wanted to know about the "rules;" if there was a "vehicle" to get into court; if there were timelines; if there were procedures written in Michigan law that he had to know for the purpose of challenging his conviction and sentence.

He wondered frequently about the reason Michigan procedures, laws, and cases appeared to be different than federal in restitution especially but in other ways, too, like pleas.

He often asked for me to send him "habeas" information. I looked at the law library and online and couldn't find anything in Michigan. He asked for this information frequently.

I was able to find the Gahan case and send it to him.

Some of the legal materials I sent were returned to me by the prison.

I have dozens of letters where he is asking me for legal materials, or to call an attorney, or to go to the law library, to call the trial court or Michigan Court

of Appeals for help; many requests were to obtain "habeas" information.

Either no one knew the answers to the questions I was asking or no one wanted to help.

When I would visit Duluth, he would gently urge me to find all the materials he needed.

He was very concerned about following all the rules, properly filing, and not missing any deadlines.

He repeatedly told me that there was a lot of federal legal information in the law library but there were no Michigan legal materials available.

He used that federal information to properly file challenges in federal court to conviction and sentence because all the appropriate information was in the library.

He sent me briefs to read and to type that covered some of the claims that he wanted to make.

There was no way to know whether his claims might be valid in Michigan or how, where, or what to file.

He frequently expressed frustration that he didn't know what or where to file.

He was concerned that his case might be permanently dismissed for violating some rule hé didn't know and couldn't find out.

I was unable to find any Michigan appellate rules.

I was unable to find state habeas statute or rules for postconviction review.

For a second time, and months before the September telephone hearing, Jason asked me to call Gordy Hoy's office to see if he was still representing him.

I received no call back from Gordy. I had spoken to him earlier in the year about habeas which he was unwilling or unable to provide. This time he didn't call me back.

In September 2005, Jason told me about the telephone hearing and said that he told the judge about his briefs and that he had issues to bring to court about the conviction and sentence that no court had ruled on previously.

He expressed frustration after the hearing because he couldn't hear everything, the judge didn't let him say everything he wanted to, and he didn't know any more about what to file or how to challenge his conviction and sentence than he did before the hearing.

I have read his affidavit and all the statements that involve me are true including but not limited to the statements in the letters he sent me.

Letters contain personal information that I prefer not be sent into the court.

All quotes used from these letters are accurate in word and context.

Jason was intense, diligent, and persistent in trying to find out what he needed to know to properly file a claim challenging his conviction and sentence while residing in Duluth.

I declare that all the statements within are true to the best of my information, knowledge, and belief.

s/Susan Williams

_____

Susan Williams
1278 Windmill Court
Rochester Hills, MI 48306
May 29, 2008
May 21, 2009